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Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHN RACZ,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Eight

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should certiorari be granted to settle the conflict among state and federal courts over whether statements made other than in response to police interrogation are "testimonial" within the meaning of the Sixth Amendment's Confrontation Clause?

2. Does California appellate courts' systemic misallocation of the burden of persuasion in applying *Chapman v. California*'s standard of review for federal constitutional error warrant this court's intervention?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Racz respectfully petitions for a writ of certiorari to the California Court of Appeal, Second District to review the judgment against him in *The People of the State of California v. John Racz* (No. B203267), which became final on December 15, 2010 when the Supreme Court of California denied review (No. S187260).

OPINIONS BELOW

The opinion of the California Court of Appeal, App. 1-82, the order of that court modifying the opinion and denying rehearing, App. 83-84, and the order of the California Supreme Court denying review, App. 85, are all unpublished.

JURISDICTION

The California Court of Appeal issued its decision on August 30, 2010. The court denied rehearing on September 29, 2010, modifying its opinion but without change in the judgment. The California Supreme Court denied review on December 15, 2010. By orders dated March 1 and April 8, 2011 (No. 10A846), Justice Kennedy granted petitioner's applications to enlarge the time to file this petition until May 5,

2011. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

STATEMENT OF THE CASE

1. In 2006, petitioner John Racz was indicted for the murder of his wife, Ann Racz, who had disappeared without a trace in 1991. The prosecution case rested heavily on statements she had made to family and friends (including the wife of a police officer) portraying him as a potentially violent man who had threatened to kill her if she attempted to dissolve their marriage. These statements, made while she was anticipating divorce proceedings, were admitted at petitioner's trial over defense objection and related by the testimony of a dozen prosecution witnesses. Petitioner – who during the 15-year interim had remained in the family home raising the couple's three children alone – was severely prejudiced by the admission of the witnesses' highly incriminating, yet arguably self-serving hearsay, which he obviously could not challenge through

cross-examination because his wife presumably was no longer alive. The jury found him guilty of first degree premeditated murder.

In rejecting petitioner's claim that admission of her out-of-court statements violated the Confrontation Clause, the California Court of Appeal adhered to the narrower side of a nationwide split of authority construing the scope of "testimonial" hearsay under *Crawford v. Washington*, 541 U.S. 36 (2004) and subsequent decisions of this Court. California's perspective is reflected in its Supreme Court's decision in *People v. Cage*, 40 Cal.4th 965, 987-991, 155 P.3d 205, 219-221 (2007), cited by the appellate court's decision, App. 74-77, as well as more recent state high court decisions presently binding California courts which hold that statements are only testimonial if "made to a law enforcement officer or by or to a law enforcement agent. . . ." *People v. Letner*, 50 Cal.4th 99, 200, 235 P.3d 62, 137 (2010) (citing *People v. Geier*, 41 Cal.4th 555, 605, 161 P.3d 104, 138-139 (2007)). That cramped reading of the Confrontation Clause appears inconsistent with common law decisions of the founding era which generally barred use of comparable unsworn statements. Indeed, the unfairness of using this particular kind of hearsay against a defendant has long been recognized: petitioner was accused by a dead person he could not cross-examine – "a voice from the grave charging appellant with past acts of brutality and cruelty and charging that he had made threats against his wife's life." *United States v. Brown*, 490 F.2d 758, 767, n. 29 (D.C. Cir. 1973)

(internal quotation marks omitted) (applying *Shepard v. United States*, 290 U.S. 96 (1933)).

2. The prosecution presented evidence that four days before Ann Racz's sudden disappearance, Ann had carried out a plan kept secret from petitioner and moved with the couple's three children from the family house to an apartment she had leased nearby; she already had hired a lawyer and intended to obtain a dissolution of their marriage. On April 22nd, she dropped off two of the couple's three children for a visit with their father. After Mr. and Mrs. Racz conversed for some time in front of the garage, Ann drove off to pick up fast food for the children. Petitioner was observed driving a vehicle following the same route a short time later. Some time afterward he returned with food; Ann did not return. With the exception of two defense witnesses who possibly saw her a day or two later, and petitioner who said they met the next day when he gave Ann some money to go away and think things over for awhile, she was never seen again. Her body has never been found.

After this point, the evidence became more murky. Despite a thorough investigation into Ann's disappearance, no forensic evidence, DNA or other physical evidence was discovered suggesting she met her death by foul play. Given the prosecution's theory that petitioner followed his wife, murdered her and hid her body so well that it remains undiscovered, the time petitioner was gone from the house on April 22, 1991 when he left to get the children food obviously

was of critical importance. Only the oldest of the couple's three children, Joann, then 14 years of age, had any useful memory of the events, but at trial a decade and a half later Joann's recollection understandably was uncertain. Joann did recall going to the garage while her parents were talking and saying she was hungry. When her mother said she would go to McDonald's, Joann went back into the house. Later, she related, petitioner came inside and said he would bring back food. Joann was not sure how long her father was away, but when petitioner returned, the food was cold. Joann acknowledged she had originally told detectives investigating her mother's disappearance, "I think he was gone a few minutes, I am uncertain of how long he was gone." She never saw either parent leave. On the other hand, Kristen Best, Joann's friend, testified she spoke on the phone with Joann on the evening of April 22, 1991, while both of Joann's parents were gone. Best thought that Joann indicated petitioner was gone for two and one-half hours; Best mentioned the conversation to her mother. But this came out only 15 years after the fact, for neither spoke to the police about these events in 1991, and other evidence suggested their belated memories were in error.[1]

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[1] Best testified the last call from Joann was after dark but other evidence showed that by then, petitioner and the children were having dinner at a pizza restaurant.

Lacking evidence of how, when or where Ann Racz may have died, the prosecution case advanced speculation about petitioner's motive and opportunity to kill her, based substantially on hearsay testimony related by family members and friends recounting Ann's statements that petitioner had threatened to harm or kill her if she left him. Overruling petitioner's objections, the trial court found Ann's statements admissible under state rules allowing the admission of hearsay as evidence of the declarant's state of mind, Cal. Evid. Code § 1250, and "under the nonhearsay purpose of circumstantial evidence to show the crime occurred."[2] The court ruled that the Sixth Amendment principles established by *Crawford v. Washington, supra*, 541 U.S. 36 were inapplicable under the doctrine of "forfeiture by wrongdoing," relying on the then-recent decision in *People v. Giles*, 40 Cal.4th 833, 152 P.3d 433 (2007).

While admitting Ann's out-of-court accusations against petitioner, the court excluded other evidence that supplied good reason to question their reliability. For during the months leading up to her disappearance, unbeknownst to petitioner, Ann was having an affair with Robert ("Bob") Russell. And in the more than a hundred often intimate letters she wrote Russell overlapping the very time she was telling

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[2] However, despite the purported limited purposes for which the testimony was admitted, the Court of Appeal did not hesitate to cite the hearsay concerning petitioner's threats as direct evidence of his guilt. App. 59.

friends and relatives that petitioner was threatening to kill her, she confided no such fears to Russell. That omission suggested that the testimony of Ann's friends and family may have reflected post-hoc exaggerations born out of frustration over her 16-year disappearance, or were efforts by Ann to lay groundwork in anticipation of divorcing petitioner for the sake of her lover.

3. Following petitioner's trial, this Court granted certiorari in *People v. Giles*, *supra*, and in *Giles v. California*, 554 U.S. 353 (2008) it overruled the California decision, holding that the state court should not have treated the common law doctrine of forfeiture by wrongdoing as an exception to the Sixth Amendment's confrontation requirement because that forfeiture rule was not established at the time of the founding of the Bill of Rights or in American jurisprudence developed since that time. *Id.* at 357-368. Hence when petitioner timely appealed his conviction to the California Court of Appeal, that court agreed with petitioner that given this Court's *Giles* decision, the trial court erred in applying the forfeiture doctrine to bar petitioner's claim. Nonetheless, the California appellate court rejected his contention that Ann's statements were admitted in violation of his Sixth Amendment right to confrontation under *Crawford*, concluding those statements were not "testimonial."

Although this Court has never done so, the state appellate court drew a bright line between the

admissibility of statements to a hearsay declarant's friends and relatives as distinguished from statements "to law enforcement officers." App. 77. It concluded "Ann's statements to her friends and relatives were not testimonial, which means the confrontation clause did not apply to the statements." *Ibid.* The court thus disregarded such factors as the statements' references to "possibly criminal past conduct" and that "[t]here was no emergency in progress . . . ," *Davis v. Washington*, 547 U.S. 813, 829 (2006), and additionally that petitioner's case exemplified "the typical murder case involving accusatorial statements by the victim," which historically have been inadmissible absent confrontation unless forfeiture by wrongdoing applied or the statement was a dying declaration. *Giles*, 554 U.S. at 361-362. Even "assuming any error in the rulings about Ann's statements," however, the Court of Appeal further found "it is not reasonably probable that the error caused prejudice, whether we apply the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 or of *Chapman v. California* (1967) 386 U.S. 18. . . ." App. 77-78.

Petitioner sought review of both issues in the California Supreme Court; his petition for review was denied without explanation.

REASONS FOR GRANTING THE WRIT

I. THE COURTS ARE SHARPLY DIVIDED ON THE QUESTION WHETHER STATEMENTS MADE OTHER THAN IN RESPONSE TO POLICE INTERROGATION – IN THIS CASE ACCUSATORY STATEMENTS AGAINST THE DEFENDANT BY THE MURDER VICTIM TO HER FAMILY AND FRIENDS – ARE "TESTIMONIAL" FOR PURPOSE OF THE CONFRONTATION CLAUSE

A. At issue in petitioner's case is whether the Sixth Amendment's Confrontation Clause protects the accused *only* against hearsay statements that are made to law enforcement officers, and not the kinds of statements Ann Racz made to her friends and relatives, which according to the California appellate court "'lacked those attributes of testimony by a witness that are the concern of the confrontation clause.'" App. 77 (quoting *People v. Cage*, 40 Cal.4th 965, 971, 155 P.3d 205, 208 (2007)). The California Supreme Court's narrow view of what is "testimonial," *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004), to which the Court of Appeal necessarily adhered, is not an outlier, but it is not universal either; indeed, the state and federal courts are deeply divided on this question. Of course, the Constitution's text prescribes no such restriction upon its protection, providing simply that "the accused shall enjoy the right . . . to be confronted with the witnesses against him."

The Court of Appeal's decision tracking the California Supreme Court's treatment of *Crawford*

and *Davis v. Washington*, 547 U.S. 813 (2006) in *Cage*, its leading case, reflects the narrower side of a nationwide conflict as to the meaning of "testimonial hearsay" that requires this Court's resolution. This split reflects the different perspectives advanced by two prominent constitutional scholars – Professor Akhil Reed Amar of Yale Law School and Professor Richard Friedman of University of Michigan Law School – whose writings the Court cited in *Crawford*. 541 U.S. at 61. As summarized in *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004):

> "Professor Amar contends that the Clause encompasses 'those "witnesses" who testify either by taking the stand in person or via government-prepared affidavits, depositions, videotapes, and the like.' Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 Geo. L.J. 1045, 1045 [sic] (1998). Professor Friedman, in contrast, urges a broader definition of 'testimonial' that would include any statement 'made in circumstances in which a reasonable person would realize that it likely would be used in investigation or prosecution of a crime.' Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L.Rev. 1171, 1240-41 (2002)." *Id.* at 673; accord, *State v. Jensen*, 727 N.W.2d 518, 526 (Wisc. 2007).

Unlike California's position in petitioner's case, many jurisdictions have found – consistent with Professor Friedman's views – that the protection afforded by the Confrontation Clause and the scope of what

is "testimonial" reaches beyond hearsay statements made directly to law enforcement actors. See, *e.g.*, *State v. Jensen*, *supra*, 727 N.W.2d at 527-528 (following Prof. Friedman's view and finding letter given by murder victim to friend, to give to police "if anything ever happen[ed]" to declarant, was testimonial even though other statements of victim were not); *State v. Sanchez*, 177 P.3d 444, 451-453 (Mont. 2008) (following Friedman and concluding that note given to friend describing declarant's husband's threat that he would kill her if he found out about her cheating was testimonial); *Miller v. Stovall*, 608 F.3d 913, 916-926 (6th Cir. 2010) (suicide note and related incriminating materials prepared by defendant's former lover and discovered after his suicide were held "testimonial," although the note was not addressed to law enforcement). Other jurisdictions, however, are aligned with the California view dictated by *Cage* and other state supreme court cases,[3] expressing views closer to Professor Amar's interpretation. See, *e.g.*, *People v. Ahib Paul*, 803 N.Y.S.2d 66 (App. Div. 2005); *State v. Miller*, 896 A.2d 844, 859 (Conn. App. 2006).

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[3] See *People v. Geier*, 41 Cal.4th 555, 605, 161 P.3d 104, 138-139 (2007) (holding "that a statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial. Conversely, a statement that does not meet all three criteria is not testimonial"); accord *People v. Letner*, 50 Cal.4th 99, 200, 235 P.3d 62, 137 (2010) (following *Geier*).

Although the question presented by this petition has divided the lower courts, it thus far remains unanswered by this Court's decisions. For instance in *Davis v. Washington*, *supra*, 547 U.S. 813, the Court observed that "our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Id.* at 823, n. 2. Restricting its holding to statements that were "the product of interrogations," *id.* at 822 & n. 1, the opinion in *Davis* cautioned, "[t]his is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial." *Ibid.* In the Court's most recent elaboration of *Crawford*, the majority opinion did not mention the question, see *Michigan v. Bryant*, 131 S.Ct. 1143 (2011), but Justice Scalia, stating the issue somewhat more broadly, noted he remained "agnostic about whether and when statements to nonstate actors are testimonial." 131 S.Ct. at 1169 (Scalia, J., dissenting).

California's courts, like the decision in the present case, have resisted any suggestion that statements of the kind Ann made to her relatives and friends, rather than "during a law enforcement interview," App. 77, possessed "'those attributes of testimony by a witness that are the concern of the confrontation clause.'" *Ibid.* (quoting *People v. Cage*, *supra*, 40 Cal.4th at 971, 155 P.3d at 208). The Court of Appeal reasoned that because Ann's statements "did not fall within any of the categories of testimonial evidence named in *Crawford*," they could not

be viewed as "made under 'circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' (*Crawford*, *supra*, 541 U.S. at p. 52.)" App. 77. Finding support from *State v. Parks*, 2 So.3d 470, 478-480 (La. App. 2008), which focused on the circumstance that "'[t]he victim was speaking to a friend, and not the police,'" the court in petitioner's case quoted with approval the Louisiana appellate court's understanding of the reach of the Confrontation Clause as confined to "'the purview of . . . the classes of testimonial statements mentioned in *Crawford*,' . . . ." App. 76. The court therefore concluded that "Ann's statements to her friends and relatives were not testimonial which means that the confrontation clause did not apply to the statements." *Id.* at 77.[4]

As will be shown more fully below, state courts as well as the lower federal courts disagree as to whether the protection of the Confrontation Clause applies only to statements that are a product of law enforcement questioning and, if the protection is broader, to what statements it extends. Deciding petitioner's case, of course, will not answer every question in this area, but as the conflict widens the need for

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[4] The California Court of Appeal parted company only with the trial court's reason for overruling petitioner's objection on confrontation grounds, recognizing that the trial judge had erred in rejecting petitioner's Confrontation Clause claim under the forfeiture-by-wrongdoing doctrine in light of this Court's reversal of the California Supreme Court decision in *People v. Giles* after petitioner's trial. *Giles v. California*, 554 U.S. 353 (2008).

clarification concerning the Clause's reach outside the limited context of statements to law enforcement has become pressing. And the case for broader application of the Confrontation Clause than California's in this context has venerable roots: historical analysis suggests that the type of statements at issue in petitioner's case – with its specter of conviction by a "voice from the grave" whose accusations a defendant is helpless to challenge – comes within the purview of the Sixth Amendment.

B. The problem was aptly described by the Alaska Court of Appeals as follows:

> "Many courts have noted the extremely prejudicial and inflammatory nature of a victim's accusatory statements 'from the grave'. *See, e.g., People v. Coleman*, 38 Cal.3d 69, 211 Cal.Rptr. 102, 111, 695 P.2d 189, 198 (1985); *State v. Prudden*, 212 N.J.Super. 608, 515 A.2d 1260, 1263 (App.1986); *State v. Downey*, 206 N.J.Super. 382, 502 A.2d 1171, 1178 (App.1986). Even in cases where the victim's accusatory statement was found to be properly admitted to prove or explain the victim's ensuing actions, appellate courts have acknowledged that this type of evidence is fraught with inherent dangers, and that it requires rigid limitations on its admission and its use by the jury. *See United States v. Brown*, 490 F.2d 758, 766 (D.C. Cir. 1973).
>
> "When the victim of a murder was involved in a close relationship with the person accused of the murder, and when the jury

> hears evidence that the victim feared or predicted that they would meet death at the hand of the defendant, it is a natural tendency for the jury to surmise (in the words of our supreme court in *Wyatt*) that '[if] the victim feared the accused, the accused likely did something [in the past] or planned to do something [in the future] to justify the fear.'" *Linehan v. State*, 224 P.3d 126, 141 (Alaska App. 2010) (citation omitted).

This Court may have had such concerns in mind when in *Giles v. California*, 554 U.S. 353 (2008), it referred to "the typical murder case involving accusatorial statements by the victim," which historically have been inadmissible absent confrontation unless forfeiture by wrongdoing applied or the statement was a dying declaration. *Id.* at 361-362. Petitioner submits that historical perspective is apt here as well. The Court's opinion in *Giles* cited a host of early decisions from many jurisdictions excluding statements of murder victims to persons with (as far as those cases indicate) no connection to law enforcement authorities or the government; it would seem implicit in the Court's recognition of that body of cases that the cited statements noted with approval were testimonial within the meaning of *Crawford*. *Giles*, at 363-364. In at least two, the witnesses were apparently friends or acquaintances of the declarant. See *King v. Commonwealth*, 4 Va. 78, 80-81 (Gen.Ct. 1817); *Gibson v. Commonwealth*, 4 Va. 111, 116-117 (Gen.Ct. 1817).

Another early case previously cited by this Court suggests that affiliation with law enforcement is not decisive, holding that an alleged victim's complaint made to her mother "immediately upon coming home" from an alleged assault was inadmissible because the victim was "not sworn or produced as a witness on the trial." *King v. Brasier*, 1 Leach 199, 200, 168 Eng. Rep. 202 (K.B. 1779). Indeed, the court there even referred to the victim's statements as "testimony": *Brasier* stated that "no testimony whatever can be legally received except upon oath." 168 Eng. Rep. at 202. In *Crawford*, this Court cited *Brasier* as illustrating that "[u]nder the common law, although the courts were far from consistent, out-of-court statements made by someone other than the accused and not taken under oath, unlike *ex parte* depositions or affidavits, were generally not considered substantive evidence upon which a conviction could be based." 541 U.S. 36, 69-70, n. omitted. Considering *Braiser*'s holding in its factual context, this proposition is not restricted to statements made to law enforcement or other government agents.

Other early decisions reinforce the perspective that the common law did not deem it significant whether a hearsay statement was made to law enforcement or other government actors. In *Weldon v. State*, 32 Ind. 81, 82 (1869), the court held that an alleged victim's statements that were "elicited . . . by her parents soon after" an alleged assault with intent to commit rape were inadmissible because the declarant did not testify and the statements were "not

[made] in the presence of the accused." In *Binns v. State*, 46 Ind. 311, 313-314 (1874), a dying declaration of the deceased – to whom it was made is not stated – expressing the declarant's belief it was her husband who had shot her based on his prior threats, was found inadmissible. Similarly in *Jones v. State*, 30 So. 759 (Miss. 1901) the court held that a statement by the dying murder victim, that the defendant had said he was coming to her house that night and if he saw another man talking to her he would kill her, was erroneously admitted. Indeed, exclusion of such evidence, without regard to whether the person testifying to the hearsay accusation was affiliated with the state, appears to have been the commonly accepted rule. See, *e.g.*, *Seifert v. State*, 67 N.E. 100, 101 (Ind. 1903) (citing cases).

In addition to the historical concern about accusations by an unanswerable dead victim, it appears contrary to the purpose of the Confrontation Clause to admit such statements without an opportunity to challenge their accuracy through cross-examination because of their potential *unreliability*. The Court recently observed in *Michigan v. Bryant*, *supra*, 131 S.Ct. 1143, that the fact the statements at issue were the product of an "ongoing emergency" provided assurance that the participants were focused "on something other than 'prov[ing] past events potentially relevant to later criminal prosecution.'" *Id.* at 1157 (footnote omitted) (quoting *Davis*, 547 U.S. at 822). Thus, "the prospect of fabrication in statements given for the primary purpose of resolving that emergency

is presumably significantly diminished . . . ," so that "the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination." *Bryant*, 131 S.Ct. at 1157 (footnote omitted). Referring to the justification underlying the excited-utterance exception to hearsay rules, for instance, *Bryant* suggested in that instance reliability is assured because "'such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation'. . . ." *Ibid.* (quoting *Idaho v. Wright*, 497 U.S. 805, 820 (1990)). And *Bryant* offered other examples of hearsay rule exceptions that "similarly rest on the belief that certain statements are, by their nature, made for a purpose other than use in a prosecution and therefore should not be barred by hearsay prohibitions." 131 S.Ct. at 1158, n. 9.

Some assurance of reliability even absent cross-examination arguably might apply to the kind of "off-hand, overheard remark" or "casual remark to an acquaintance," which *Crawford* suggested as exemplifying statements lying outside the protection of the Sixth Amendment, 541 U.S. at 51, on the basis that the described circumstances suggest a diminished likelihood "'of fabrication, coaching, or confabulation'" by the declarant. *Bryant*, at 1157. But by the same token, petitioner's case demonstrates that the fact a declarant's statements were neither made to law enforcement nor the product of interrogation provides no *inherent* assurance of reliability as would *ipso facto* warrant denial of the right to confrontation.

Moreover, Ann's accusations against petitioner were far from casual in terms of their content, the large number of people to whom she repeated them, and their timing: she made them while actively planning to leave petitioner and eventually marry her secret lover Bob Russell. By distributing her accusations far and wide amongst at least a dozen friends and relatives, Ann ensured they would reach the ears of potential witnesses – whether law enforcement should she disappear, or in divorce proceedings she intended to institute.[5] Even the California appellate court acknowledged that her statements fairly could be read this way. For example, "Ann told Judy Carter, another friend from the women's circle, that [petitioner] was 'abusive' and 'very controlling,' including in their sex life, and he had threatened to 'stop her' if she left him . . . and gave Bob's telephone number to Carter so that Bob could be contacted if anything happened to her," App. 10; and "Ann told Theresa Minch [the wife of a police officer], another friend

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[5] Noting a hypothetical posed by Justice Kennedy at oral argument in *Crawford*, Professor Friedman has suggested that a statement that may be characterized as testimonial with respect to possible civil litigation probably should be considered testimonial for Confrontation Clause purposes. Richard D. Friedman, *Grappling With the Meaning of "Testimonial,"* 71 Brooklyn L.Rev. 241, 249 & n. 26 (2005). Certainly, the reliability concerns expressed in *Bryant* are implicated to the extent hearsay statements were made in anticipation of litigation – whether civil or criminal. See *Palmer v. Hoffman*, 318 U.S. 109, 113-114 (1943), cited in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2538 (2009).

from church, that [petitioner] was verbally abusive and had threatened to kill her if she left him." *Ibid.*

Obviously, statements such as these reasonably may be understood as self-serving, and their purpose may well have contemplated the anticipated divorce proceedings which could be expected to pose disputes concerning financial and child custody issues. Also undermining the easy implicit assumption by the California Court of Appeal that Ann's statements were inherently reliable is the fact that in sharp contrast to her accusations of threats and statements of fears of violence recounted by almost a dozen witnesses, she made *no* such statements anywhere in the 104 candid and intimate letters she wrote to her lover Bob Russell during the same time period.[6] As defense counsel argued to the trial court in support of admitting these letters, "aren't the words of Ann Racz . . . in her own writing . . . more reflective of her state of mind and who she is as a person, than what somebody is reporting now that she says . . . [petitioner] said some 16 years ago[?]" That telling omission suggests that Ann's repetition of the threats to numerous people, if not a product of imagination or exaggeration, may have been a deception.[7] Thus, this

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[6] Correspondingly, in his testimony Bob Russell did not suggest that *he* expected anything to happen to her.

[7] Unfortunately, the trial judge excluded all but a few of the letters, so petitioner was not able to attack the reliability of the testimony about petitioner's threats on that basis. However, petitioner was able to show that Ann never told her divorce attorney Larry Baker that her husband was violent towards her –

(Continued on following page)

clearly was not the kind of hearsay contemplated by *Bryant* as being so reliable that it may be admitted even without being "subject to the crucible of cross-examination." 131 S.Ct. at 1157.

C. As previously noted, the division which has developed nationwide on this issue is partially the outgrowth of an important academic debate between Professors Akhil Amar and Richard Friedman, as ably summarized in *United States v. Cromer*, *supra*, 389 F.3d 662. There the Sixth Circuit adopted Professor Friedman's "somewhat broader" formulation, preferring his understanding of *Crawford* to "Professor Amar's definition, which would implicate the Confrontation Clause only in the instance of formalized statements – such as affidavits, depositions, and government-prepared recordings – made directly to the authorities." *Cromer*, at 674. And it explained: "We are unable to discern how the additional formalities identified by Professor Amar are necessary components of a testimonial statement." *Ibid. Cromer* concluded: "The proper inquiry, then, is whether the declarant intends to bear testimony against the accused." *Id.* at 675.

The Third Circuit followed *Cromer* in *United States v. Hinton*, 423 F.3d 355, 359-360 (3d Cir. 2005), noting that similar views had been adopted by other

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something that (had she mentioned threats) would have concerned Baker and led him to seek a restraining order if necessary.

federal circuits. *Id.* at 360 (citing *Horton v. Allen*, 370 F.3d 75, 83-84 (1st Cir. 2004), *United States v. Saget*, 377 F.3d 223, 229 (2d Cir. 2004), and *United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005)). The Seventh Circuit has also followed *Cromer*, *United States v. Ellis*, 460 F.3d 920, 924-925 (7th Cir. 2006), as have courts of several states. See, *e.g.*, *State v. Ray*, 938 N.E.2d 378, 386 (Ohio App. 2010); *State v. King*, 132 P.3d 311, 315 (Ariz. App. 2006); *Com. v. Gonsalves*, 833 N.E.2d 549, 558 (Mass. 2005); *Shennett v. State*, 937 So.2d 287, 291 (Fla. App. 2006).

But other courts have taken a narrower view similar to that favored by Professor Amar. See *State v. Barnes*, 854 A.2d 208, 211-212 (Me. 2007) (statement by victim who drove to police station and reported her son had assaulted and threatened to kill her was not testimonial absent "structured police interrogation"); *State v. Scacchetti*, 690 N.W.2d 393, 395-396 (Minn. App. 2005) (child's statement to nurse practitioner non-testimonial, although practitioner was aware her examinations might be used in a criminal case); *People v. Geno*, 683 N.W.2d 687, 692 (Mich. App. 2004) (child's statement reporting sexual abuse not testimonial when "made to the executive director of the Children's Assessment Center, not to a government employee"); *Evans v. Luebbers*, 371 F.3d 438 (8th Cir. 2004) (*Crawford* limited "'to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations'") (quoting *Crawford*, *supra*, 541 U.S. at 68); *State v. Davis*, 638 S.E.2d 57, 61 (S.C. 2006) (statement not

testimonial because "made outside of an investigatory or judicial context"); *People v. Ahib Paul*, *supra*, 803 N.Y.S.2d 66 (similar); *People v. Cage*, *supra*, 40 Cal.4th at 987-991, 155 P.3d at 219-221 (similar); *People v. Geier*, *supra*, 41 Cal.4th at 605, 161 P.3d at 138-139 (statement is testimonial only if "made to a law enforcement officer or by or to a law enforcement agent"); *State v. Miller*, *supra*, 896 A.2d at 859 (statement not testimonial because it "does not qualify as either testimony at a preliminary hearing, testimony before a grand jury or testimony at a former trial, nor was it obtained via police interrogation" (citing *Crawford*, at 68, and compiling other decisions)); *State v. Stahl*, 855 N.E.2d 834, 844-845 (Ohio 2005) (statements made during interview by nurse not testimonial although including description of assault, and victim authorized release of evidence "to a law enforcement agency for use only in the investigation and prosecution of this crime").

Petitioner's case offers an ideal opportunity to resolve this conflict because the California court squarely held the statements at issue here were not "testimonial" in that they were made to the alleged victim's relatives and friends, not to law enforcement or other state actors. Such a drastic limitation on the Confrontation Clause does not appear supported by the historical record of decisions during the founding era, particularly in failing to acknowledge earlier courts' exclusion of the kind of accusatory statements by a murder victim as not admissible under the common law. Indeed, such hearsay accusations

recounting past threats – "the voice of the dead wife was heard in accusation of her husband" – are of a type that long have troubled courts, *Shepard v. United States*, *supra*, 290 U.S. at 98, and here, especially given Ann's plans to divorce petitioner and hence their possibly self-serving nature, her accusations were not so inherently reliable that their admission without the opportunity for cross-examination can be squared with the Confrontation Clause. Certiorari should be granted to review the decision of the California Court of Appeal that Ann's statements were not testimonial hearsay under *Crawford*.

II. PETITIONER'S CASE ILLUSTRATES THE CALIFORNIA APPELLATE COURTS' SYSTEMIC MISALLOCATION OF THE BURDEN OF PERSUASION IN APPLYING *CHAPMAN V. CALIFORNIA*'S STANDARD OF REVIEW FOR FEDERAL CONSTITUTIONAL ERROR

The California Court of Appeal's dismissive treatment of petitioner's *Crawford* claim was compounded by its terse finding that any assumed error "in the rulings about Ann's statements" was not prejudicial "under any standard." App. 77-78. Asserting that "[a]side from Ann's statements, there was abundant evidence that she feared [petitioner] after she moved out of the Fortuna house," and "[t]here also was overwhelming evidence of [petitioner's] guilt," in a bare 18 lines of discussion it found no reasonable probability "that the error caused prejudice, whether we apply the standard of *People v.*

Watson, 46 Cal.2d 818, 836 (1956), or of *Chapman v. California*, 386 U.S. 18 (1967) (*Chapman*)." *Id.* at 78.

As recently explained by the Statement of Justice Sotomayor (joined by Justices Ginsburg, Breyer and Kagan) respecting the denial of the petition for writ of certiorari in *Gamache v. California*, 178 L.Ed.2d 514, 131 S.Ct. 591 (2010), when ordinary error under California law is involved, "'[i]n the absence of misconduct, the burden remains with the *defendant* to demonstrate prejudice under the usual standard for ordinary trial error.'" 178 L.Ed.2d at 515, 131 S.Ct. at 592 (quoting *People v. Gamache*, 48 Cal.4th 347, 397, 227 P.3d 342, 387 (2010)) (emphasis added). A critical distinction between *Chapman* and California's *Watson* test, *People v. Watson*, 46 Cal.2d 818, 836-837, 299 P.2d 243, 254-255 (1956), as recognized by Justice Sotomayor, is which party bears "the burden of persuasion" on the question of prejudice. *Gamache*, *supra*.[8]

"Under our decision in *Chapman v. California*, 386 U.S. 13, 24 (1967), the prosecution must carry the burden of showing that a constitutional trial error is

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[8] This statement in the California Supreme Court's *Gamache* opinion was unusual in its omission to cite the *Watson* test by case name, but one of the decisions the State Supreme Court cited in *Gamache* did cite *Watson*, *People v. Cooper*, 53 Cal.3d 771, 836, 809 P.2d 865, 903 (1991); and *Gamache* and *Cooper*, as well as several other cases cited in the *Gamache* court's discussion, 48 Cal.4th at 397-398, 227 P.3d at 823-824 all imposed the burden on the defendant *as appellant* to demonstrate prejudice.

harmless beyond a reasonable doubt." *Gamache*, 178 L.Ed.2d at 514, 131 S.Ct. at 592 (Statement of Sotomayor, J.). Under California's *Watson* test, however, its appellate courts will not find an error of state law prejudicial *unless* the *defendant* establishes the reasonable probability of a more favorable result absent the error. 46 Cal.2d at 836-837, 299 P.2d at 254-255. This distinction is not merely makeweight. As the authority cited by Justice Sotomayor demonstrates, "the allocation of the burden of proving harmlessness can be outcome determinative in some cases." 178 L.Ed.2d at 515, 131 S.Ct. at 593.

That message seemingly has been lost on the California appellate courts. Shortly after the concerns expressed by four members of this Court appeared in *Gamache*, a majority of the State Supreme Court repeated its analysis in *People v. Hernandez*, 51 Cal.4th 733, 247 P.3d 167 (2011). In *Hernandez* the entire court agreed that the trial court had abused its discretion by failing to make a case-specific determination of the necessity for resort to security procedures before stationing a deputy sheriff at the witness stand while the defendant testified. But declining to apply *Chapman*'s harmless-error test governing the unjustified use of visible shackles, see *Deck v. Missouri*, 544 U.S. 622, 635 (2005), a divided majority of the *Hernandez* court used the *Watson* test

to hold defendant had not established a reasonable probability that he had been prejudiced.[9]

Which standard is actually being applied – and the party to whom the "burden of persuasion" is being allocated – when the prejudicial effect of federal constitutional error is at issue may indeed be "outcome determinative," *Gamache*, 178 L.Ed.2d at 515, 131 S.Ct. at 593 (Statement of Sotomayor, J.); but too often, it can only be a matter of guesswork to the reader of California intermediate appellate court decisions like this one. Using a superficial analysis that has become all too familiar to California criminal appellate practitioners, the Court of Appeal's failsafe-type fallback pronouncement simply assumed error, and then (without troubling to assign the burden to one side or the other) found it "not reasonably probable that the error caused prejudice, whether we applied the standard of . . . *Watson* . . . or of *Chapman*. . . ."

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[9] Two justices in *Hernandez*, disagreed with the majority's use of *Watson*, concluding that as in *Deck* and *Holbrook v. Flynn*, 475 U.S. 560 (1986), the prejudicial effect of the security measures unjustifiably enforced at Hernandez's trial was not readily demonstrable from a trial transcript, hence, "a defendant need not demonstrate actual prejudice to make out a due process violation." 51 Cal.4th at 745, 247 P.3d at 176 (citing *Deck*, at 635) (Moreno, J., concurring and dissenting). While agreeing with the affirmance of the defendant's conviction because his testimony "essentially admitted every element of the charged offense without providing substantial evidence of any affirmative defense," *ibid.*, Justice Moreno joined by Justice Kennard would have allocated the burden of showing harmlessness to the State.

App. 77-78. The court never articulated recognition of *Chapman*'s harmless beyond a reasonable doubt standard, nor acknowledged the State's burden under the harmless-error rule. 386 U.S. at 24.

Instead, the court's own application of that mixed "standard" in the remaining two paragraphs (all of 13 lines) clearly demanded of petitioner that *he* meet *his* "burden of persuasion." It asserted there was "abundant evidence" of Ann's fear of petitioner "[a]side from" her statements, and the "overwhelming evidence of [petitioner's] guilt." App. 78. At no point did the court acknowledge the distinct analysis required to determine prejudice when the burden is allocated to the Government, or indicate it understood "*Chapman* as 'placing the risk of doubt' about harmlessness on the State." *Gamache*, 178 L.Ed.2d at 514, 131 S.Ct. at 592 (quoting *O'Neal v. McAninch*, 513 U.S. 432, 438-439 (1995)); see also *ibid.* (citing *United States v. Dominguez Benitez*, 542 U.S. 74, 81, n. 7 (2004) ("When the Government has the burden of addressing prejudice, as in excusing preserved error as harmless on direct review of the criminal conviction, it is not enough to negate an effect on the outcome of the case"); *Arizona v. Fulminante*, 499 U.S. 279, 295-296 (1991) (when the record is reviewed *de novo* to determine an error's harmlessness, "it must be determined whether the State has met its burden of demonstrating" that the error "did not contribute to [defendant's] conviction") (both citing *Chapman*, 386 U.S. at 24).

In the almost 45 years since this Court in *Chapman* last corrected California's constitutionally erroneous evaluation of prejudice in cases of constitutional error, California courts (especially in more recent years) have drifted from the sharply defined line this Court established when it rejected California's *Watson* standard for state-law error as the test for prejudice by "fashioning a harmless-constitutional-error rule. . . ." 386 U.S. at 22. The decision's failure to differentiate between *Chapman* and *Watson* is a regular feature of California cases, one that is particularly common when the decision (as is true for 90 percent or more of California Court of Appeal opinions) is not published and therefore receives scant attention beyond the parties. Yet allocation of the burden of persuasion could well have made a difference between affirmance and reversal here. And the decision's cryptic discussion of the evidence that rendered any assumed error not prejudicial, App. 78, reflects an analysis reminiscent of one this Court has rejected as flawed – i.e., as if the appropriate inquiry was "whether in a trial that occurred without the error, a guilty verdict *surely* would have been rendered," *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993), without regard to the proper focus on "the significance" of the error "to reasonable jurors, when measured against the other evidence considered by those jurors independently" of the error. *Yates v. Evatt*, 500 U.S. 391, 403-404 (1991).

Petitioner's case presents an opportune moment to rectify the inadequate approach to harmless-error

review systemic in California appellate opinions, whose effect is to trivialize the significance of federal constitutional error. It is quite unlike the California Supreme Court's *Gamache* opinion in this respect; there the court's detailed recitation of evidence and analysis allowed the four members of this Court who expressed reservations about California's application of *Chapman* to find "it *seems* that the burden allocation would not have altered the court's prejudice analysis." 178 L.Ed.2d at 514, 131 S.Ct. at 593 (Statement of Sotomayor, J., respecting the denial of certiorari) (emphasis added). No such confidence is possible here where the state appellate court's opinion never acknowledged that in applying *Chapman* the burden of persuasion was on California, *not* petitioner, and that the State's burden was to demonstrate harmlessness by proof beyond a reasonable doubt.

Accordingly, this Court's grant of certiorari in petitioner's case should include consideration of the proper burden-of-persuasion allocation which state courts must use to evaluate the prejudicial effect of federal constitutional error under *Chapman*, and whether the California Court of Appeal's haphazard *Watson*-or-*Chapman* approach passes constitutional muster.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: May 3, 2011

Respectfully submitted,

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOHN RACZ, Defendant and Appellant.	B203267 (Los Angeles County Super. Ct. No. BA320288) (Filed Aug. 30, 2010)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald S. Coen, Judge. Affirmed.

Law Offices of Dennis A. Fischer, Dennis A. Fischer, John M. Bishop, and Alan S. Yockelson, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Joseph P. Lee, Susan Sullivan Pithey and Catherine Okawa Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

On April 18, 1991, Ann Racz (Ann) left her husband, appellant John Racz, and moved with the couple's three children to a leased condo near the

family home on Fortuna Drive (the Fortuna house).[1] Appellant was served with divorce papers the next day. On April 22, Ann left the children with appellant at the Fortuna house while she drove off to buy food at a McDonald's restaurant that was five minutes away. Appellant followed Ann in his car, leaving the children at the house. He returned later to the children with cold french fries. The children, Ann's close friends and relatives, and her boyfriend never heard from her again. Evidence of her character and habits showed that she was a reliable, devoted mother who always maintained contact with the children and her relatives when she traveled and did not travel without certain items still at the condo.

Appellant thereafter made various factually inconsistent statements, in which he basically said that (a) he met with Ann at restaurants on April 23 and 24 and gave her money to take a trip, and (b) she called him on April 26 to say she was leaving her minivan at a parking lot and taking a shuttle bus to the airport. Despite a massive investigation, the sheriff's department never found anything to support appellant's claims or to show that Ann was alive after April 22. Her body was never found. Appellant raised

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[1] For simplicity, and meaning no disrespect, we will refer to Ann and some witnesses by first names or nicknames, as those names were used during the trial.

All subsequent events occurred in 1991 unless otherwise specified.

the children at the Fortuna house while maintaining that Ann was "out there gallivanting" somewhere.

In 2006, as a result of a cold case investigation, new evidence came to light that showed appellant was gone for two and a half hours before he returned with the cold french fries. Following a grand jury indictment, appellant was tried for Ann's murder. During the trial, there was evidence that Ann told many friends and relatives that she was afraid of appellant and that he had threatened to kill her if she left him. Ann's statements were introduced for the limited purpose of her state of mind, because of appellant's claims that Ann met with him alone at restaurants on April 23 and 24. The jury found appellant guilty of first degree murder, and he was sentenced to 25 years to life in prison. This appeal followed.

Appellant contends that (1) his conviction is not supported by substantial evidence, for the issues of identity and premeditation, (2) the precharging delay violated his state and federal constitutional rights to due process of law, (3) the trial court erred and violated the confrontation clause of the Sixth Amendment when it admitted Ann's statements about her fear and his threats, and (4) the trial court should not have excluded most of the 109 love letters Ann wrote to her boyfriend.

We find no error and affirm.

FACTS

1. Prosecution Evidence

A. Background

The Fortuna house was in Valencia, in the Santa Clarita Valley. In 1991, "less than a mile," and about "five minutes" away from the Fortuna house, there was an area called "Hamburger Hill," which contained a McDonald's restaurant, a Carl's Jr. restaurant and a Tip's restaurant. Just beyond the restaurants, there was a road leading into a "very rural" area that was "like being out in the wilderness." There were numerous other undeveloped areas in the Santa Clarita Valley at that time.

Appellant was a sixth grade teacher at an elementary school in Compton. He was six feet tall, weighed 190 pounds, and kept four handguns in the house. He had formerly been a sergeant with the Los Angeles County Sheriff's Department. His training at the sheriff's academy around the late 1960's included how to apply a "bar arm control hold," in which the deputy puts his arm around the neck of a suspect from behind and pulls. For another hold, called a "carotid hold," the deputy stands behind a suspect, places his arm in a "V" around the suspect's neck, and pushes on the carotid artery, which cuts off blood to the brain and causes unconsciousness.

Appellant and Ann, whom we sometimes call the Raczs, had three children. In April 1991, their older daughter Joann was 14 years old and in high school. Their son Glenn and daughter Katelin were,

respectively, 11 and 7 years old. Glenn was in the sixth grade and Katelin was in the second grade at the same elementary school. In 2007, when Joann, Glenn and Katelin testified at appellant's trial, they were, respectively, 30, 27 and 23 years old.

Ann was five feet three inches tall and weighed 110 pounds. She was an immaculate housekeeper, always put groceries away promptly, and made lists of what needed to be done. She was never seen in public without her hair carefully groomed and her makeup in place. Many witnesses described her as an extremely reliable person and devoted mother who would not have abandoned her children for any amount of money.

She was the "team mom" for Katelin's soccer team, assisted with Brownies troop meetings and YMCA swimming lessons, helped to "spearhead" a school program for gifted children, was an active member of the PTA, and regularly volunteered in the children's classrooms and school libraries. She never missed a parent conference, school event or open house. She picked the children up after school, took them to their numerous sports activities and lessons, cooked dinner for them, helped them with their homework, and got them ready for school the next day. She also wrote the newsletter for her homeowner's association and was active in her church.

Ann came from a close-knit family that included her mother and aunt (Aunt Kay), who lived in Hawaii; her sister Emiko Ryan (Emi), who lived in

Arizona; her adult niece Katherine Ryan (Kathy), who was Emi's daughter and lived near the Fortuna house; and her brothers Joji Yoshiyama (Joji) and Takeo Yoshiyama (Takeo), who lived in other parts of Los Angeles County.

Ann traveled with appellant and the children and also took two trips out of the country with Aunt Kay. She never traveled without her curling iron and makeup kit. When she traveled without the children, she left a detailed itinerary so the children always knew where she was going and how long she would be gone. She telephoned the children frequently, provided in advance for everything they might need, and sent postcards and letters to them and to her family members. For example, when Ann and appellant once left Katelin with neighbors while they took a two-week trip, Ann telephoned Katelin every night.

When she traveled by air, Ann always had a friend or relative transport her to Los Angeles International Airport (LAX). She never took a shuttle bus to LAX from the Van Nuys Flyaway (the Flyaway), as she worried the bus might be late.

Appellant was described as a "control freak" who wanted to know where Ann was at all times. Appellant and Ann had a joint net worth of over $500,000, but appellant "was really tight with money," and kept careful track of all household expenditures. He had rules for when toilets could be flushed, did not permit the heat to be turned on in the house, and did not allow the use of air conditioning unless the temperature

reached 100 degrees. He had Ann on a very frugal food budget that made it difficult for her to purchase traditional Japanese foods at holidays. Although she never forgot a holiday or her relatives' birthdays, the gifts she gave were homemade.

In an effort to make some money for herself, Ann had a small, not-very-profitable business called "Monday Flowers," that involved supplying flower arrangements to restaurants once a week. She had a separate bank account and post office box for Monday Flowers. She also worked 10 hours per week for a Presbyterian minister, Pastor Glen Thorp (Pastor Thorp), whom she always told about her travel plans.

In 1989, Ann was contacted by Robert Russell (Bob), whom she had dated in high school and who lived in San Rafael, north of San Francisco. Ann and Bob soon communicated "[a]lmost daily by letter or phone." They did not use the address or telephone of the Fortuna house, so Ann called Bob from pay phones, and Bob used the post office box of Monday Flowers for the letters he sent to Ann. In early 1989, Ann and her younger daughter Katelin spent a weekend in San Rafael with Bob and his young daughter, who was with Bob on weekends. When Ann subsequently went to Oakland for a PTA meeting, she and Bob became sexually intimate. They fell in love and hoped to live together eventually. Ann planned, however, to live with the children at the condo while the divorce and custody arrangements were in progress. Bob testified that Ann told him she intended to

move "quickly and silently" from the Fortuna house, as she feared retaliation from appellant.

After Ann disappeared, Bob gave to the sheriff's department detectives all of the letters that Ann sent him. Excerpts from some of the letters were introduced at the trial. They showed that Ann was looking forward to leaving appellant and spending her future with Bob and the children.

B. Ann's Preparations and Fears

Ann discussed her plans and intentions with many friends and relatives. She told everyone she was taking the children with her when she left appellant and never mentioned taking a trip.

In her frequent telephone conversations with Emi, Ann stated that she wanted to divorce appellant, hoped for custody of the children, and was willing to share custody if necessary. She described her preparations for the move and said she and the children might need to stay temporarily with Joji.

Ann also had frequent conversations with her best friend, Dee Ann Wood (Dee Ann). Ann and Dee Ann both belonged to the women's circle, a church group that met once a month for Bible study and for discussions of issues in the women's lives. Several years before Ann disappeared, Ann once talked about "just being free and . . . not having to answer to anybody." Then Ann said, "Maybe I should just leave." That was the only time Dee Ann heard Ann talk that

way and Dee Ann knew that Ann was joking, as Ann was an extremely dedicated mother.

Many months before the move, Ann told Dee Ann that she was waiting to move out while she investigated the bank accounts that she and appellant had to ensure that she received her half of the community property.

In March or April 1990, Ann began receiving marriage counseling from her employer, Pastor Thorp. She told Thorp that appellant controlled and suffocated her, forced her to do things she did not want to do, and became angry if she did anything without his permission. She talked with Thorp about Bob, but her "number one priority" was the children. She said she was afraid to move out because appellant had guns and had threatened to kill her if she left him, using words like: "If you ever leave me, I'll find you no matter where you go. I'm going to stop you, whatever it's going to take."

Around January 1991, Ann told Dee Ann that she had asked appellant for a divorce, he did not want one, and she was preparing to move quickly with the children. She indicated that she had talked with the children about their favorite toys so those toys would be moved to the condo. She also said she was afraid of appellant because he had guns and scared her by hitting his hand against a door so forcefully that he broke his hand. She complained that the more she talked of leaving, the more he tried to control her. She

stated that he "made her have sex every night" and "she was afraid of what would happen if she didn't."

Similarly, Ann told Judy Carter, another friend from the women's circle, that appellant was "abusive" and "very controlling," including in their sex life, and he had threatened to "stop her" if she left him. She told Carter about the incident in which appellant broke her [sic] hand and gave Bob's telephone number to Carter so that Bob could be contacted if anything happened to her.

Ann told Therese Thomas, the librarian at Joann's high school, that she was afraid of appellant because he had a gun and "had threatened to kill her if she ever tried to leave." Ann and Thomas discussed Thomas's experience with her own divorce. Thomas advised Ann to plan ahead and provide a residence where the children would feel comfortable, so that they would have a smooth transition to their new home.

Ann told Theresa Minch, another friend from church, that appellant was verbally abusive and had threatened to kill her if she left him. Ann also said that, even though she was afraid of appellant, she planned to divorce him, but she was concerned about the effect of the divorce on the children and wanted sole custody.

During a conversation with Christina Bibel, another friend from the women's circle, Ann said she had become involved with another man, appellant knew about it, she was leaving him and taking the

children with her, and she hoped to eventually live "up North" with the children and the other man.

Ann also discussed her plans with Cheryl Jensen, the librarian at the elementary school. In mid-February, Ann came into Jensen's office "crying and shaking" and said she was "tired of being afraid" and "tired of being controlled." She told Jensen that, while appellant was cleaning his guns or had his guns out, he said to her, "If you leave me, I will kill you."

On the weekend of February 16, Ann's sister Emi gave Ann a $2,500 check to help pay for a divorce lawyer and the rent on a condo. Ann did not want appellant to know about the check, so she deposited it into the checking account of her floral business.

On February 20, Ann wrote to Bob: "When I get so wrapped up in my problems at home, I stop and try to imagine a better loving life with you."

In early March, Ann met with a divorce attorney named Larry Baker. She told Baker she wanted to begin an action to dissolve the marriage, planned to immediately relocate in the same area with the children, and hoped eventually to live with the children and Bob. Baker informed Ann that all of the Raczs' assets were community property that would be split between them when they divorced. Ann replied that money was very important to appellant and she feared retaliation, especially because he would have to support her. Baker helped Ann with timing so that the move from the Fortuna house was made before appellant was served with the dissolution papers. In

the meetings Ann had with Baker, her "central concern" was "[e]stablishing a new life with someone else with her kids."

Around this time, Ann told her oldest daughter, Joann, about her plans, and asked Joann not to tell appellant because appellant might "do something to her."

Once Ann decided to leave appellant, she and appellant attended joint counseling sessions with Pastor Thorp. Thorp observed that appellant "was a confident and controlling person."

On March 15, Ann told Katelin's teacher that she was preparing to take the children with her when she left appellant, and she wanted to be notified if there were any changes in Katelin's behavior.

In mid-March, Ann spoke with Dee Ann, Emi and Kathy at a wedding shower for Emi's other daughter, Patty. Ann said she had contacted a lawyer, was planning to rent the condo for at least six months, and was waiting to make the move until after Patty's wedding because she wanted to be sure the children were at the wedding. She was hoping for custody of all three children, would share custody if necessary, and was keeping the move a secret from appellant because she did not want him to stop her.

On March 26, Ann filled out a rental application for the condo, for a period of six months to a year. She put down a deposit a few days later. She purchased a television set and video recorder so the children

would have something to do there, in case she could not afford to take them to movies.

Around this time, Ann told her friend Judy Carter that she hoped to have custody of all three children and was sure she would have custody of Katelin.

In April, the Raczs' older daughter, Joann, had a close friend named Kristin Best (Kristin), who was the same age as Joann. Kristin often spoke with Joann on the telephone, was frequently at the Fortuna house, and went on outings with Joann and Ann. Sometime in April, in front of Kristin, Ann told Kristin's mother that when Kristin and Joann were at the Fortuna house they were not to tell appellant the location of the condo, as Ann "feared for her life."

In the first or second week of April, Ann told Glenn's teacher that there was about to be an upheaval in her family and she wanted to be notified if Glenn's behavior changed. Around this time, Ann reminded Joann not to say anything to appellant about the move, and she asked a former teacher of Glenn's "what it was like to be a single mother."

On April 12, Ann sent Bob a postcard that had a notation, "before leaving for S.D. [San Diego]." The postcard read: "'D' day is soon. Will give you a day-by-day account just to let you know I'm okay."

On Saturday, April 13, appellant, Ann and the three children attended Patty's wedding in San Diego. Aunt Kay was at the wedding, and Ann gave her the

new wedding ring she had bought for herself in Hawaii, so that Aunt Kay could take it back to the jeweler for sizing.

On Sunday, April 14, Ann returned from San Diego, signed the lease on the condo, paid the balance due, and picked up the key.

On Monday, April 15, Ann took possession of the condo and began secretly moving items there. She made sure that Dee Ann and Kathy had Bob's telephone number so that Bob could be contacted if anything happened to her. She told Dee Ann and Kathy that on the following Thursday, movers would carry various items from the Fortuna house to the condo. She planned to pick up the children after school that day, tell them about the divorce, and take them to the condo. She intended to take them on an outing the next day, instead of to school. She feared that appellant would be violently angry when he was served with the divorce papers.

On Tuesday, April 16, Ann told Pastor Thorp that she had selected a condo near the Fortuna house so that the children would not have to change schools. That night, Ann discussed her plans at the regular monthly meeting of the women's circle. Among those present were Dee Ann, Judy Carter, Christina Bibel, Pam Cottrel, Roberta Bailey, and Patricia Fulton. They all testified at the trial. With a "very frightened" demeanor, Ann asked the members of the group to pray for her and the children. She said she was divorcing appellant and moving to a leased condo

with the children in two days. She was concerned about the impact of the separation and divorce on the children. The move was to be performed quickly, after appellant and the children left. She planned to pick up the children after school and take them to the condo, as she did not want to be around when appellant received the divorce papers. She said he had a violent temper, had previously "struck out" at objects inside the house, kept guns in the house, and had threatened to kill her if she left him. She intended to keep her new address a secret from him and was going to take the children to a different church that Sunday. She realized it would be safer to leave the area, but she did not want to disrupt the children's school year. She told the group that appellant was planning to murder her, as he "would sit in a dark room and tell her he was planning . . . the perfect crime."

After the meeting, Christina Bibel asked Ann if Ann thought appellant was really capable of murder. Ann looked at Christina with "fear in her eyes" and said, "He told me he would kill me and they would never find the body."

The following day, April 17, Ann told Pastor Thorp, Judy Carter and Cheryl Jensen that she was moving the next day. She also told Jensen that she was nervous because appellant had threatened to kill her.

C. April 18 Through April 21

On Thursday, April 18, Ann woke up Joann, announced that it was moving day, and promised to pick up all three children after school. Once appellant and the children were gone, professional movers took various items to the condo, including clothing, toys, and some of the furniture. Dee Ann and Kathy helped with the move. Instead of parking next to the condo, Ann kept her car parked at a shopping center down the street, so that appellant would not know where she lived.

Sometime that day, Ann told Katelin's teacher that, after school, she was going to tell the children about the divorce and take them to the condo. She said she was afraid of appellant but was sure she was doing the right thing. She did not have a telephone at the condo, so she gave the teacher Dee Ann's name and telephone number as the contact person in case of emergency.

After school, Ann picked up the three children and drove them to a park. She told them that she and appellant loved them, and "she would still always be there" for them, but she did not love appellant anymore and was leaving him. Then, she drove the children to the condo and said it was their home.

About 1:30 p.m., appellant told Peter Danna, the principal of the school where he taught, that Ann had suddenly left him and taken the children. He requested time off from work to deal with his marital situation. He asked Danna these questions: "Do you

think I'm the kind of guy that would be violent?" "Do you think I'm a mean person?" "Do you think I'm the kind of person who would hurt somebody?" Danna answered "No" to each question and granted the request for time off.

When appellant returned home, he unsuccessfully tried to learn Ann's new address from his neighbor Pedersen and from the moving company. He also called Pastor Thorp and arranged for a counseling session that weekend.

On Friday, April 19, Ann took the children on an outing instead of to school. At various points that day, she spoke with Bob, her attorney, Dee Ann, and Cheryl Jensen. She was relieved, exuberant, and looking forward to the future, and she made a lunch date with Jensen for the following Thursday.

Approximately this day, Ann called her neighbor and good friend Brenda George (Brenda), who had children the same age as the Raczs children, and who sometimes helped Ann with babysitting. Ann told Brenda about the separation and asked Brenda not to tell appellant where the condo was. Brenda drove to the condo and spoke with Ann. Ann said she feared appellant, was determined to leave him, and was doing everything possible to give the children a smooth transition.

Appellant was served with the divorce papers on Friday, April 19.

Sometime on Saturday, April 20 or Sunday, April 21, Ann told Kristin Best's mother that appellant was angry with her, she feared for her life, and it was important that Kristin and Joann not tell appellant where the condo was and not let anyone follow them home from school.

On Saturday, April 20, Ann took Joann and Glenn to Magic Mountain while Katelin went to Sea World with her Brownies troop. Ann's niece Kathy visited the condo around 4:30 p.m. Ann was only partly unpacked. She was happy and optimistic about the future. She continued to park down the street and planned to return the new video recorder, as it did not work. She said the children had spoken with appellant on the telephone and she had agreed to meet with him and Pastor Thorp, even though it made her sick to her stomach to be around him. She planned to drop the children off with appellant after church the next day.

That evening, appellant and Ann met with Pastor Thorp for counseling. Appellant, but not Ann, wanted to save the marriage.

The next day, Sunday, April 21, Ann took the children to a different church and then dropped them off at the Fortuna house, without leaving her minivan or turning off its engine. She then telephoned Bob from a pay phone and told him how happy she was to have left appellant. She discussed with Bob their plan to take all of their children to Disneyland on June 2. That was the last time Bob ever spoke with her.

Ann also called her brothers and Emi that day. She was "relieved," "happy" and "adamant" about her decision to leave appellant, but she was willing to meet with appellant and Pastor Thorp at appellant's request. She intended to go to the Fortuna house the following day to pay the workers for some tile work, but she "wanted to leave before [appellant] came home." The mother of Ann and her siblings were visiting in the Los Angeles area at Takeo's house, and Ann planned to visit her mother there on Wednesday, April 24.

That evening, Sunday, April 21, Ann and appellant had another counseling session with Pastor Thorp. Appellant wanted Ann to come back, but Ann wanted a divorce. Appellant did not offer Ann money, and there was no mention of a trip. Another counseling session was scheduled for the following Thursday. Thorp feared for Ann's safety, so he emphasized that appellant and Ann should not be alone together. After the session, when Ann drove Thorp home, she told Thorp she was confident about her decision to end the marriage.

Around 8:00 p.m., Ann's neighbor Brenda saw Ann pick up the children at the Fortuna house, without leaving the minivan.

D. Monday, April 22

Appellant did not go to work that day or any other day that week.

When Ann took the children to school that morning, she kissed Katelin goodbye, as usual. Katelin never saw Ann again. She brought her teacher a note from Ann that said Ann would be picking Katelin up after school every day that week except Monday, when Katelin had afterschool activities with her Brownies troop.

Later that morning, Ann closed out a joint certificate of deposit account worth over $13,000. At Ann's request, the bank gave her a check for $3,000 payable to herself, a check for over $8,900 payable to appellant, and $1,300 in cash. Ann then went to another bank and deposited the $3,000 check into the account of her floral business. She never withdrew that money.

Sometime that day, Ann told Glenn's teacher that she and the children had moved and she wanted to be told if Glenn's behavior changed.

According to a grocery receipt that was later found in the condo, Ann purchased the materials for making homemade pizza at 1:51 p.m.

When Ann picked up Glenn and Joann after school that day, she told them they were going to the Fortuna house because appellant wanted to see them and she needed to talk with him. She explained that, after the visit to the Fortuna house, she would drive the children to the condo and make them pizza for dinner. When they arrived at the Fortuna house, Ann pulled into the garage and stayed inside the minivan. Appellant stood next to the minivan and spoke with

Ann through the rolled-down driver's side window. At Ann's request, Glenn and Joann left the minivan and waited inside the house.

After a while, Joann came outside and told appellant and Ann that she was hungry. Ann said "she would go get McDonald's." It was about 4:00 p.m. Joann went back into the house. Appellant came inside, told Joann and Glenn that "he was the one going to go get food," and left. Joann and Glenn stayed inside. They did not see either of their parents drive away, they did not say goodbye to Ann, and they never saw or heard from Ann again.

The Fortuna house was on a block that ended in a cul-de-sac. Two neighbors who happened to be in front of their homes watched while Ann talked with appellant. Both neighbors knew about the Raczs' recent separation. One of them, Thomas Deardorff (Deardorff), lived in a house on the same side of the street as the Fortuna house, but three houses closer to the open end of the street. The other neighbor, Pedersen, lived across the street from the Fortuna house.

Deardorff was washing his car in his driveway when Ann drove up with Joann and Glenn. He paid attention because Joann was supposed to babysit for him and his wife that evening and he wondered if Joann was still going to do that, following her parents' separation. He watched as Ann sat in the minivan and talked with appellant. When Ann started to drive away, he flagged her down and asked if Joann

would be babysitting that night. Ann answered that Joann would be there. She told Deardorff "she had to go because she had to get the kids something to eat." Then, she drove off.

"Very shortly after" Ann left, Deardorff saw appellant driving down the street in the direction Ann had taken. The time period was so short that appellant "could have been following" Ann. Appellant usually waved at Deardorff, but this time he "looked straight ahead." Deardorff stayed outside for "about an hour," and he did not see either appellant or Ann return.

The other neighbor, Pedersen, saw that the brake light of the minivan was on continuously while Ann talked with appellant. When Ann backed out of the driveway and started driving down the street, Pedersen saw appellant enter the Fortuna house. Pedersen noticed that Deardorff was waiting to talk to Ann. Then, Pedersen looked back at the Fortuna house. He saw appellant come out of his garage hurriedly, enter his car, back out rapidly, and drive down the street. Looking down the street, Pedersen saw that Ann's minivan "was just rounding the curve, and [appellant] was right behind her."

After her afterschool Brownies troop activity, Katelin was dropped off at the Fortuna house by one of the Brownies' mothers around 5:00 p.m.

Appellant later returned to the children with a bag of "ice cold" french fries from McDonald's. Joann asked appellant where Ann was. Appellant said Ann

"went away to think." Joann thought Ann would return that night, as Ann planned to make pizza at the condo, the children's clothes were at the condo, and Joann and Glenn had left their schoolbooks and backpacks inside Ann's minivan. Appellant took the children out for pizza, the children spent the night at the Fortuna house, and Ann did not return.

E. Appellant's Absence from the Fortuna House

In 2007, at the time of the trial, the three Raczs children did not recall how long appellant was gone before he returned with the cold french fries. They made inconsistent statements prior to the trial.[2] The time period that appellant was gone was established at the trial by the testimony of Joann's friend Kristin, who first came forward with her evidence in 2006.

Kristin testified that on the night Ann disappeared, Joann repeatedly called her, "in fear," over a period of "[t]wo and a half hours." During the calls, Joann said that after Ann left to get food at McDonald's, appellant told the children that he, rather than Ann, was going to get the food, and he would be "right back." In her repeated, worried phone

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[2] For example, in 2007, at the trial, Joann recalled that appellant brought back cold food, she did not recall how long he was gone, and she thought that period was definitely less than half an hour." In 1991, shortly after Ann disappeared, Joann told the missing persons detectives that appellant brought back "ice cold" food, she was not certain how long he was gone, and she thought he was gone for five minutes.

calls to Kristin, Joann stated that the three hungry children were alone in the house and she did not understand why appellant was taking so long to return from McDonald's, as it was "right down the street." In the last call to Kristin, Joann wanted to know why appellant went to get the food after Ann left to do that, why appellant "was gone for two and a half hours," and why he eventually showed up with "freezing cold" food.

Kristin's testimony about Joann's phone calls was corroborated by Kristin's mother, who learned about the calls from Kristin, but did not pass on that information to the investigators after Ann disappeared.

At the trial, Joann did not recall speaking to Kristin on the night Ann disappeared, but testified that it "would have been typical for [her] at the time" to speak on the telephone with Kristin.

F. April 23 Through the End of 1991

Around 7:00 a.m. the next day, Tuesday, April 23, appellant called his neighbor Brenda. He said the children spent the night at the Fortuna house, Ann had taken all of their clothes, and he needed to borrow clothes for Katelin, who only had her Brownies uniform. He also asked Brenda to pick up Katelin after school. Brenda did as she was asked. For the remainder of that week, she continued to pick up Katelin after school and babysit her until appellant came home, which sometimes was as late as 7:00 p.m.

Appellant did not go to work that entire week and he was not home very much.

When Joann returned to the Fortuna house after school, she saw on the kitchen table the items that she and Glenn had left in Ann's minivan the previous day. Joann asked appellant where the "stuff" came from. He said Ann dropped it off. He also said Ann told him the children would rather stay with him. Joann responded that she would rather stay one week with each parent. Appellant again said Ann "went away to think."

Joann was worried, as she knew that Ann had not planned a trip and intended to live with the children at the condo. Joann called Pastor Thorp and Judy Carter and told them Ann was missing. At Joann's request, Thorp drove to the condo to check on Ann. He got no response when he rang the doorbell, so he left a note.

That evening, Katelin's and Glenn's teachers were surprised when Ann did not attend the elementary school's open house. Ann thereafter missed everything she had planned and all the important events in the lives of her children and family members.

Around 7:00 a. m. the next day, Wednesday, April 24, appellant again telephoned Brenda. This time he asked Brenda to loan him clothes for Glenn and to accompany Glenn on a field trip. Brenda did as she

was asked and brought Glenn home with her after school. Appellant called Brenda at 1:45 p.m., told her he was at a bank in Los Angeles, and asked her to pick up Katelin from school. Brenda picked up Katelin and babysat her until 7:00 p.m.

Around this time, Bob received the last letter Ann wrote him, which Ann mailed on the day she disappeared. In the letter, Ann discussed her happiness at leaving appellant and being involved with Bob. Regarding the plan to meet at Disneyland, she wrote Bob, "I can't wait to stroll down Main Street with you."[3]

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[3] At the trial, Bob read aloud the entire letter. It stated: "Hello dear heart and gentle lover, when I need a kiss, you kiss me. When I need to be held, you put your arms around me and embrace me with so much warmth and affection. You know just when to do the things I love you to do. I hope I respond to you just the way and when you want me to. Actually, it's all the time. If I start to smother you too much, please let me know. I will understand because I love you. I won't take offense. A part of our loving ways is to be able to openly communicate our feelings and needs. I think we do that so well. [¶] It amazes me how in tuned we are to each other, how we complement each other so well, how we understand and can fulfill each other's needs so smoothly. I hope our many years of life experiences have imparted great wisdom and patience to us so our compatibility will remain intact for the rest of our lives. I have such a strong faith in our relationship flourishing and lasting. [¶] Your honesty and encouragement enforces that faith I have. How can I ever thank you for what you do for me emotionally, spiritually, mentally and physically. I'll do anything for you. Just say it. I wish I could give you the world. Would you settle for little ol' me? [¶] I never in all my fantasies and imagination could have conjured up everything that has happened to us, especially the feelings. It

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Around this time, Joann and Glenn began making covert trips to the condo, to retrieve clothes and other things they needed, and to leave notes for Ann. They discovered it was possible to enter the condo through its sliding patio door, which had a faulty lock. There was no sign that Ann had been at the condo or was traveling. Her curling iron and makeup bag were in the bathroom, and she would not have traveled without them. Her closet was filled with clothes. The

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overwhelms me beyond my wildest dreams. This is greater than fiction. Don't worry, our dream will not end. We will be able to live up to each other's expectations because we have such a strong bond of love. I'm realizing the strength and power of love, and I'm confident love will get us through all our trials and tribulations just fine. [¶] I know you realize this because you've mentioned it before. One cannot demand, control or force the other and still maintain respect. This is also the exact point my pastor made to [appellant] during our meeting. That's what he was doing to me. That was a major factor in our downfall. So hopefully, my life with you will work because all the wrong things will not be part of our philosophy. Am I presuming right? [¶] Enough philosophizing. Let's just get on with it and have a fun life. [¶] At this point I feel I can say to you with your approval I am exclusively yours. You've always had my love, but now I dedicate my body as it is, flaws, flabs and shortcomings, to you, sweetheart. [¶] I will never have sex with [appellant] again. I will not touch him again. You don't know how good that makes me feel. I'm free. I want to celebrate this first victory, my first big step by making sensuous mad love to you. I want to share my joy with you. I need you so much, but I'll be a good girl and wait for the appropriate opportunity. [¶] The next time we get together everybody stand back or you will get hit by some hot sparks because I may get passionate right there where we stand upon our first embrace. Would you be embarrassed? I may forget I'm a lady. I can't wait to stroll down Main Street with you. Until then, or sooner."

pizza crust and bottle of pizza sauce were on the counter, where Ann would not have allowed them to remain. The calendar of her daily activities had no entries after April 22.

On Thursday, April 25, appellant called Pastor Thorp and said he but not Ann would be at that day's counseling session. Thorp was surprised not to hear directly from Ann. When appellant arrived, Thorp saw a scratch on the right side of appellant's face and another on appellant's right hand. The scratches looked "a couple [of] days old." Appellant told Thorp that Ann "had gone away," and showed no concern about her.

On Friday, April 26, Ann's niece Kathy learned about Ann's disappearance when Joann called her. Kathy, Emi, Brenda, and Dee Ann conferred on the telephone and decided to have Brenda ask appellant about Ann. When Brenda called appellant, he said Ann "was gone," she was safe, she had asked him for money, he had given her money, he had an idea where she might be, and he thought she would return. Then he said, "When I think that she may not come back, it makes me want to cry."

On Sunday, April 28, Kathy entered the condo, saw what Ann left behind, and spoke again with Emi and Dee Ann.

On Monday, April 29, appellant returned to work, without mentioning that Ann was missing. Peter Danna, the principal of the elementary school where appellant worked, saw that appellant had a one and

one-half to two-inch scratch mark down his neck. The scratch mark appeared to have been made by a fingernail and extended from the bottom of the jaw bone almost down to the bottom of the neck.

On approximately April 29, appellant told Pastor Thorp "that Ann had called and said she was leaving the car at the Flyaway in Van Nuys." Appellant implied that Ann had gone away on a trip and suggested she might be with a male friend. Thorp did not think Ann would take a trip without telling him.

Similarly, on April 29, appellant told Roma Prior, a friend from church, that Ann had called him on Sunday, April 28 and refused to say where she was.

On Tuesday, April 30, Pastor Thorp spoke on the telephone with Emi and Bob, who were very worried about Ann's continued disappearance. The following day, at Emi's request, Thorp filed a missing persons report.

On May 2, Sergeant John View and Detective Sally Fynan of the sheriff's department's Missing Persons Unit (the missing persons detectives) began investigating Ann's disappearance. Pastor Thorp spoke with the detectives and then visited appellant. When Thorp asked appellant when he last saw Ann, appellant became visibly enraged about the fact Ann left him, and yelled about an unpleasant argument he had with her in the driveway of the Fortuna house.

That same day, May 2, Emi arrived from Arizona and went with Kathy to see appellant. When Emi

asked where Ann was, appellant answered that Ann took a trip. Emi replied that she had discussed Ann's plans with her, and the plans did not include a trip. Appellant then said Ann went away to think. He added that he was not worried about her, but it was difficult for him to work and take care of the children at the same time. He thought it would be easier for him "in seven weeks when school was out." Emi was surprised, as she thought Ann was taking a short trip. Appellant evaded further questions and only said he gave Ann some money when he last saw her, on a Monday or a Tuesday.[4]

The following day, May 3, Emi and Kathy entered the condo and saw everything Ann left behind, including her curling iron, toothbrush, makeup, and clothes. Later that day, Emi again asked appellant where Ann was. This time appellant said he met Ann at the Tip's restaurant on Tuesday, April 23, and she was wearing the Hawaiian wedding ring. He said he again met her on Wednesday, April 24. Emi suggested filing a missing persons report. Appellant told Emi that Ann called him on Friday, April 26 and told him her car was parked at the Flyaway, so he went to the Flyaway and moved the car into the shade.

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[4] This was the first time appellant said he met with Ann after April 22. We will describe his various versions of the meetings but will note only a few of the many discrepancies about details.

Emi and Kathy were suspicious. They knew that Ann never used the Flyaway, there was no shade there, she had never taken a trip without telling anyone, and she and the children had just moved to the condo. Kathy drove by the Flyaway and saw Ann's minivan parked there.

On May 4, Kathy, Emi and Joann went to the condo together. Joann pointed to the curling iron and said Ann would never have left it behind.

Also on May 4, appellant cancelled that day's counseling session with Pastor Thorp. That afternoon, Thorp went to see appellant and again asked where Ann was. This time appellant said he gave Ann money on two different days so she could "get away and think about it a little bit." The first meeting was at a Jack in the Box restaurant and the second at a Tip's restaurant.[5] Appellant said he did not know where Ann had gone or how long she would be gone. The scratches Thorp had previously seen were still visible.

Around this day, Ann's friend Dee Ann entered the condo and saw the makeup bag and curling iron. Dee Ann did not think Ann would travel without those items or that Ann would take a trip while she was trying to get the children adjusted to the condo and the divorce.

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[5] This was the only time appellant mentioned a Jack in the Box restaurant.

Also around this day, Emi noticed a pink "line scratch" on appellant's hand or arm.

On May 6 and the following days, the missing persons detectives spoke several times with Joann about Ann's disappearance. In describing the events, Joann said appellant told her he gave Ann $8,000 on April 22.

The missing persons detectives also interviewed appellant on May 6. Contrary to all the other evidence, appellant said Ann stated at the counseling session with Pastor Thorp on April 21 that "she was still considering the situation." Appellant also indicated that later on April 21, he took the children out to a restaurant, and Ann came to the restaurant and took the children home with her. Regarding April 22, appellant said that Ann came to the Fortuna house with the money from the closed certificate of deposit, kept $3,000 for herself, and gave him $1,300 to pay for construction work and an $8,000 check. At his request, she returned to the house with the children, and they talked outside the house. Because she enjoyed traveling "he wanted to give her the opportunity to go on a vacation and think things over." He offered to "give her any amount of money she wanted in an effort to convince her that he would no longer be tight with his money, as she had told him he was." Ann left the children with him, and he promised to take care of them. Ann and the children said goodbye to each other, and she left. He met with her the following day at the Carl's Jr. restaurant and gave her $8,000. He met her the next day at the Tip's

restaurant and gave her $17,000 cash. He hoped the money would convince her to continue the marriage. She told him "she was going away to think about things but she wouldn't say where." She telephoned the Fortuna house between 2:30 p.m. and 3:00 p.m. on April 26. She said she was "going away to think about things," "she was taking a shuttle to the airport," she would call him in the future, her car was parked at the Flyaway, and he could either leave it there or pick it up. He went to the Flyaway and moved her car into the shade to avoid damage to the video recorder that was inside it.

Also on May 6, Emi told the missing persons detectives that Ann was "a very stable person," and it was "very unlike her" to leave in this manner.

The next day, May 7, the missing persons detectives went to the Flyaway and looked at Ann's locked minivan. There was no sign of foul play, the "driver's seat was set in the far back position," and there was no shade. That day, a local broadcast about Ann was initiated and she was entered into the national database for missing persons.

On May 8, Pastor Thorp told the missing persons detectives about the marital counseling sessions, Ann's fear of appellant, and Thorp's advice that Ann and appellant were "not [to] be alone together at any time." Thorp also said that Ann had "made up her mind" to divorce appellant, appellant told Thorp on April 25 that Ann "had taken him up on his offer for

her to go away," and Ann's "disappearance was totally out of character" for Ann.

Later on May 8, the missing persons detectives went to the Fortuna house to interview all three children, but appellant refused to allow interviews with the two younger children. He gave the detectives the key to Ann's minivan and said he had not heard from her since April 26. He recognized Sergeant View, who had been with him at the Firestone sheriff's station in the 1970's, and asked View to go upstairs with him for a private conversation. View agreed. When they were upstairs, View asked appellant where Ann was. He said Ann was "on a trip to an unknown location," but he provided no verification. He kept redirecting the conversation to other subjects. He said that he and Ann had marital problems of a sexual nature, he was a good father, he had enjoyed being a deputy sheriff, and he did not know why people thought he had anything to do with Ann's disappearance.

The missing persons detectives and Joann went to the condo together that day. Along with the previously mentioned items inside the condo, the detectives observed that there were milk products in the refrigerator that would spoil over time. Joann said she thought Ann was dead, as it was "completely out of character for her" not to tell anyone where she was. Joann also stated that Ann feared appellant but Ann had not been afraid that appellant would hurt the children.

Around this time, Ann failed to appear in court for the divorce proceedings, and Emi and Kathy cleared out the condo. While Emi was packing up Ann's possessions, she found about $180 in cash.

On May 10 and May 11, the missing persons detectives spoke with Emi, Dee Ann and Kathy. They learned about Ann's excitement about her relationship with Bob and her happiness at leaving appellant. They also learned that Ann never used the Flyaway, feared violence from appellant, and had not been parking the minivan at the condo. Dee Ann reported that she had spoken with Bob, who told her he last spoke with Ann on April 21 and received no communication from her after the letter with the April 22 postmark.

On May 13, the missing persons detectives spoke with Bob and with Ann's attorney, who also had not heard from Ann.

Due to the suspicious nature of Ann's disappearance, the investigation was transferred on May 13 to the sheriff department's homicide unit and assigned to Sergeant Frank Salerno and Detective Louis Danoff (the homicide detectives).

On May 14, the homicide detectives drove to the Flyaway and saw that the front seat of Ann's minivan was pushed completely back, which would not have accommodated a person of Ann's size. In the driver's side visor, there were two pieces of paper, a parking stub and an undated note. The parking stub showed that the minivan entered the Flyaway at 10:00 a.m.

on April 25, a day before appellant said Ann called him from the Flyaway. The note said "Thank you" and was signed "A." Detective Salerno telephoned appellant and asked for permission to have the minivan towed for processing. Appellant agreed and asked Salerno if they had worked together at Firestone Station. Salerno answered no. The testing showed that there was no blood in the minivan.

On May 15, Bob told the homicide detectives that he had been sending letters to the post office box of Ann's floral business. When the post office box was opened, it contained a letter from Bob.

Around 7:15 that evening, the homicide detectives and Detective Fynan went to the Fortuna house. When they told appellant they were there to investigate Ann's disappearance he responded, "She is not missing, she is on vacation." He then gave a very detailed statement.

Appellant told the homicide detectives that about two years earlier, Ann said "she was tired of the house routine, the kids and that; that she wanted to get away." She took two trips with her aunt and also went to visit Emi. She began corresponding with Bob and visited Bob twice, which caused appellant and Ann to argue. Still, appellant was completely surprised when Ann moved out with the children on April 18. She telephoned him that evening but refused to meet with him. She called him again on Friday, April 19, refused to meet with him, but agreed to joint counseling sessions with Pastor Thorp. When

they met with Thorp on Saturday, April 20, appellant promised to be a better husband and proposed that they sleep in separate bedrooms. According to appellant, Ann said she might be "willing to try it." She brought the children to visit him the next day, Sunday, April 21, and met with him and Pastor Thorp later that day. He wanted her to come back, but she refused. They agreed to divide up the $13,000 certificate of deposit and she promised to bring the money for the tile work to the Fortuna house the next day.

Regarding April 22, appellant told the homicide detectives: Ann arrived at the Fortuna house around 2:30 p.m., stayed in the minivan, and gave him the money for the tile work. At his request, she returned with the children around 3:00 p.m. He came outside and the children entered the house. He asked her to walk with him into the back patio area to talk, and she agreed.[6] He told her in the backyard that he would commit suicide if their marriage ended. He offered to cash the $8,900 check and give it to her the next day, Tuesday, April 23, so that she could travel and think about their marital situation for as long as she wanted. He also promised to remove $17,000 from another certificate of deposit and give her that money on Wednesday, April 24. Ann said "she would try it." They walked back into the garage, the children said goodbye to her, and she left. He brought the children

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[6] In contrast, the neighbors said that Ann never left the minivan.

food from McDonald's and then took them out to dinner at a restaurant.

The statement to the homicide detectives continued: On Tuesday, April 23, after the children went to school, appellant cashed the $8,900 check Ann had given him. She drove up to the Fortuna house between 1:30 and 2:00 p.m. but would not leave the minivan. They drove separately to the Carl's Jr. restaurant, went inside, and sat down together. He gave her $8,900 in cash, and they agreed to meet the next day at the Tip's restaurant, so he could give her the remaining $17,000. Before she drove away, he retrieved Joann's and Glenn's possessions from the minivan.[7] He walked home so that Ann would feel sorry for him. He walked back to the Carl's Jr. around 4:00 or 5:00 p.m. and got his car. The next day, Wednesday, April 24, he took $17,000 from a certificate of deposit in the form of two checks, which he cashed at two different banks. He got cash for Ann because he did not want her "to think of him as a cheapskate." He met her at the Tip's restaurant around 4:00 p.m. They sat down together and he gave her the $17,000 in cash. She told him "she was going away" and did not specify where or for how long.

Finally, appellant told the homicide detectives that his only other contact with Ann was when she telephoned him between 2:30 and 3:00 p.m. on Friday,

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[7] Appellant previously told Joann on April 23 that Ann dropped the items off.

April 26. In that call she "told him that she was going away; that she had parked her car at the Van Nuys flyaway; that he could leave it there or he could pick it up, whatever he felt like doing." He thought he heard cars in the background while she talked. She asked him to take care of the children and said she would contact him when she returned. He drove to the Flyaway, located her minivan, and moved it into the shade. When he did that, he saw the thank-you note, which he claimed was in Ann's handwriting. He did not know where she was, but he thought she might be in Hawaii.

At the end of the May 15 interview, the homicide detectives asked appellant for the house telephone bills from January through April 1991. Appellant agreed, except he said he could not provide the April telephone bill because he thought he had thrown it away. He continued to show no concern about Ann, avoided having the two younger children interviewed, and mainly wanted to discuss whether he and the homicide detectives had mutual acquaintances in the sheriff's department.

That day, Joann told the homicide detectives everything she knew, including the cold french fries, the continued presence of Ann's curling iron at the condo, and at the Fortuna House the reappearance on the kitchen table of the items that had been in Ann's minivan the previous day. The detectives then talked briefly with appellant about Ann's minivan, which was still at the tow yard. Appellant said he intended to move the minivan to the Flyaway "in case" Ann

came home, which contradicted his statement that Ann was merely on vacation.

On May 17, the homicide detectives went to the condo for the first time. In addition to the items previously mentioned, they saw four matching suitcases and Ann's passport. Appellant told them at some point that the remaining five pieces of a nine-piece set of luggage were still at the Fortuna house.

On May 18, Peter Danna, the principal of the school where appellant worked, was informed by a school administrator that appellant had been talking with the media about Ann's disappearance. Danna had not previously known that Ann was missing. When he spoke with appellant, appellant falsely stated that he had filed a missing persons report.

On May 20, the homicide detectives learned from Ann's siblings that Ann's family had loaned her $2,500 for the divorce and she intended to put the money into her floral business's checking account. The detectives checked that bank account and learned it had no activity after April 22. They also found out that day from Pastor Thorp that Ann was adamant about her decision to divorce appellant, which contradicted what appellant had told the detectives.

In the late afternoon on May 20, appellant refused to allow Detective Fynan to speak with the children when Fynan arrived at the Fortuna house for prearranged interviews. That evening appellant went to the sheriff's station so that his car could be

tested for blood. He resisted providing consent for the test but finally agreed to it. He said the money he gave to Ann was all in $100 bills. He still avoided having the younger children interviewed. The test of his car found no blood.

On May 22, Bob gave Detective Salerno the 109 letters that Ann wrote to him between March 11, 1990, and April 21, 1991. That same day a missing persons flyer was prepared with a picture of Ann's face.

On May 23, a moving company took Ann's and the children's possessions back to the Fortuna house. Appellant told Emi that "he was starting to get worried" about Ann. He also said he thought Ann was a Lesbian because she did not want to sleep with him anymore and did not want to wear his wedding ring.

On an unspecified date, over a month after Ann disappeared, appellant told his neighbor Deardorff that Ann "had gone away on a trip."

On May 27, appellant told the homicide detectives that he had not found the April telephone bill, he did not have a full length photo of Ann, and he still was not ready to have Glenn and Katelin interviewed.

Around this time, Ann's friend Theresa Minch told the homicide detectives that Ann told her appellant threatened to kill her if she left him.

On May 28, the homicide detectives distributed missing person flyers about Ann and learned from Roma Prior that appellant told Prior Ann called him on April 28, rather than April 26.

On June 2, appellant still avoided having the younger children interviewed.

On June 5, appellant finally agreed that Glenn and Katelin could be interviewed, and he told the homicide detectives that Ann might be in Hawaii.

On June 6, the homicide detectives created a second flyer that included photos of Ann, appellant, and Ann's minivan.

On June 8, the homicide detectives interviewed the members of the women's circle.

On June 10, Detective Fynan interviewed Katelin and Glenn.

On June 11, information about Ann was presented on various local news stations.

On June 14, Pastor Thorp told the homicide detectives about the fresh scratches he had seen on appellant's hand and face on April 25.

On June 28, appellant telephoned the homicide detectives and then went to the sheriff's station to complain about the presence of his picture on the flyers. He said he had done nothing improper and simply gave Ann money. This was the only time he ever initiated contact with the detectives. In contrast,

Ann's family members and Bob continued to call the detectives over the years.

On July 1, Emi called appellant and asked if Katelin could visit her in Arizona. Appellant said he would like to bring Katelin himself. Emi replied that Ann's family members wanted to maintain a relationship with the children, but since Ann had filed for divorce, appellant was not welcome at their gatherings. Appellant responded that he had not known that he and Ann had marital problems until the day she left him.[8] He said Ann was "probably" in Hawaii. Emi said her relatives in Hawaii would have told her if Ann was there. Appellant replied, "Yes, she is not in Hawaii."

On July 5, the homicide detectives executed a search warrant at the Fortuna house, in appellant's presence. One of appellant's guns was found in a desk drawer along with the missing April telephone bill. During the search, appellant removed his calendar from an evidence bag and crossed out the words "HELL DAY" on the part of the calendar that covered the period for April 11 through 18.

Despite an intensive investigation, the homicide detectives could find no evidence to support appellant's claims that he met with Ann on April 23 and 24 and received a call from her when she was at the

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[8] We note that appellant and Ann were going to marital counseling sessions with Pastor Thorp for that very reason.

Flyaway on April 25 or 26. However, the April telephone bill and other evidence showed that on April 26, there were three completed collect calls to the Fortuna house from a pay telephone at Terminal One of LAX. The first call, at 3:00 p.m., lasted 59 seconds. The second call, at 3:07 p.m., lasted 43 seconds. A third call, at 3:14 p.m., lasted four minutes.

On October 8, Emi called appellant and asked if the children could come to a gathering of Ann's family. Appellant wanted to come as well. Emi refused due to Ann's plan to divorce appellant. Appellant told Emi that he was regularly calling the sheriff's department about the progress of the investigation. Emi was in frequent contact with the sheriff's department and knew appellant was lying. Appellant also said Ann "went away" and she could "come back on her own."

When the children asked appellant where Ann was, he would say she was on vacation or on a trip.

On December 15, when Emi and Kathy went to the Fortuna house to visit the children, they saw a birthday card that said "for my husband" and was signed "Love, Ann." Appellant said the card was from Ann. He did not respond when Emi pointed out that the writing was not Ann's handwriting.

At some point, Aunt Kay gave Emi the Hawaiian wedding ring that Ann had given to her at Patty's wedding.

G. Events After 1991

Information about Ann was distributed to law enforcement agencies and coroner's offices in every state. Everyone in her phone book was contacted. Employees were contacted at the Flyaway, at the restaurants appellant mentioned, and at LAX. Searches of the areas near the restaurants and distribution of missing persons flyers were not productive. Except for appellant's claims, there was no credible evidence that anyone saw or heard from Ann after April 22, or that she used any form of transportation after that date, or that she met with appellant on April 23 and 24, or that she telephoned him from the Flyaway on April 26. She did not access any of her bank accounts or use her credit cards after April 22. Her missing person story was covered in numerous television programs and newspaper articles over the years, to no avail. The homicide detectives led multiple searches in areas where bodies might be dumped, such as isolated rural roads, wilderness areas, canyons, mines, and lakes. Volunteers, posses from other sheriff's stations, and fire suppression crews were utilized. Human remains were found from time to time, but they did not match Ann. However, a body is not found in every murder case, and sometimes a body is found long after a person disappeared.

Ann's family members and friends held yearly memorials for her over the years. Emi and her husband offered a $10,000 reward for information and set up an organization called "Friends of Ann." Appellant

never showed any concern about Ann and made no effort to locate her.

On March 19, 1992, appellant told Emi that Ann was "out there gallivanting," he was telling the children that Ann was "on a trip," and the children did not ask about Ann very much.

When Detective Danoff went to see appellant on February 1, 1993, appellant said he still had not heard from Ann.

On April 12, 1993, Glenn and Katelin visited Emi in Arizona. Emi told Glenn that the family was using the media to help find Ann or her remains and Ann might be in heaven. Glenn said that was what appellant said, too.

On April 23, 1993, two years after Ann disappeared, Ann's three siblings met with appellant and asked him what happened to Ann. He provided another detailed statement. The siblings wrote down notes afterwards, which they reviewed for the trial.

Appellant first told Ann's siblings that he did not know Ann wanted a divorce until she suddenly moved out with the children. Emi objected that Ann had told many people about her intention to divorce appellant, so Emi did not understand how appellant did not know about it. Appellant then said that after Ann moved out she telephoned him on the nights of April 18 and 19 and met with him and Pastor Thorp on April 20 and 21. According to appellant, and contrary to all of the other evidence, Ann said at the

counseling sessions that she would reconsider her decision to leave him.

As to April 22, the day Ann disappeared, appellant told Ann's siblings that Ann left to get the children something to eat and he never saw or talked to her again. Takeo reminded appellant that appellant had previously said he met with Ann and gave her money. Appellant "suddenly remembered" he gave Ann cash at a restaurant on a Tuesday or a Wednesday and "[s]he was going away to think for a while." He said that was the final conversation he had with Ann. One of Ann's siblings asked, "What about the car?" Appellant then said Ann called him on the following Thursday or Friday, he was not sure which.

Ann's siblings told appellant they did not want the children to think Ann left them, Ann would not have gone away without telling anyone her plans, and they knew appellant had refused a divorce. Appellant responded, "You['ll] see, wait, she'll come back." Emi told appellant, "[W]asn't it so convenient for you that Ann disappeared before the divorce was final[?]" Appellant did not respond. He agreed that the children could go to gatherings of Ann's family, but complained that he wanted to attend those gatherings himself and was tired of being accused of doing something to Ann. He wanted to know where Ann's original wedding ring was and was unhappy that Ann did not buy him a new wedding ring when she purchased one for herself in Hawaii. He also checked Emi's purse to see if it contained a tape recorder, and asked Emi if she had read Ann's letters to Bob.

After Sergeant Salerno retired in 1993, Detective Danoff continued investigating Ann's disappearance. Danoff had bulletins distributed about Ann, followed up any clues that were presented, checked databases of missing persons, and conducted further searches in isolated areas. He also went to all the annual memorials for Ann and attended the funeral of her mother.

In January 1995, Emi and Kathy returned to the Fortuna house after they took Glenn out to dinner. Emi asked appellant where Ann was. Appellant answered that Ann was "out there gallivanting," and she could call any time she wanted. Emi insisted that Ann would not have stayed away without telling anyone. Appellant did not want to talk about Ann in front of Glenn, so he and Emi went into the garage to speak privately. They soon engaged in an unpleasant exchange, during which appellant loudly repeated that Ann was "out there f____ing," and Emi repeatedly slapped appellant in the face. During this encounter, Emi directly accused appellant of murdering Ann. Appellant replied, "She went away. It's her fault that she is not here. She wanted to get away from [me]."

As the children grew up, appellant told them that Ann "went away to think," or was "on a trip," or was "on vacation." He was not consistent about how much money he gave her. Sometimes he said, "I hope she comes back, we miss her." Other times, he called her a "bitch" and a "whore," and said she was "out there f____ing around while he [was] there" for the

children. Once, during an argument with Joann, he spat on a piece of Ann's artwork.

Detective Danoff retired in 2001 but continued to work on Ann's case as a reserve deputy. In May 2005, he turned the investigation over to Sergeant Delores Scott of the Homicide Bureau Cold Case Homicide Unit. Scott asked Detective Cheryl Comstock to help her. For convenience, we will refer to Scott and Comstock as "the cold case detectives."

After reading the voluminous reports, the cold case detectives re-interviewed witnesses, checked all sources of information about missing persons, and sent out a new flyer with an age-progressed photo of Ann.

On June 9, 2006, the cold case detectives visited appellant at the Fortuna house. When the detectives identified themselves appellant exclaimed, "Oh my God. Did you find my wife?" The detectives said they were asking family members to contribute DNA samples for a new data bank. Appellant changed the subject and wanted to discuss his days as a deputy sheriff. He insisted on recording the conversation with a video camera. The detectives discussed the DNA procedure, which involved swabbing the interior of the mouth with a cotton swab and usually took about five minutes. Appellant kept changing the subject. When the detectives asked for the children's current addresses and phone numbers, appellant provided only the cities in which the children lived.

He said Ann left voluntarily and he thought she was still alive.

The cold case detectives spent over an hour with appellant and left without a DNA sample. Over the next few days, they easily obtained DNA samples from Glenn, Katelin and Joann. They later returned to the Fortuna house with a search warrant and used special equipment to check the backyard, but they found nothing.

On June 16, 2006, the cold case detectives held a press conference about Ann's disappearance, in the hope that media attention might bring forth new witnesses. This time they had success. Kristin Best, Joann's friend from high school, happened to see the "missing person" announcement on a television screen while she was running on a treadmill at a gym. She contacted the cold case detectives and was interviewed on June 30, 2006. Joann did not recall calling Kristin on the night Ann disappeared, but Kristin remembered the calls and their duration. Kristin explained that she had not come forward years earlier because her parents forbid her from being involved in the investigation. She told the detectives that Joann told her appellant was gone for two and a half hours and brought back "ice cold" french fries.

On September 8, 2006, the cold case detectives learned from Peter Danna that when appellant returned to work on April 29, 1991, Danna observed a

scratch that appeared to have been made by a fingernail.

On October 21, 2006, appellant was arrested pursuant to a warrant.

Further investigation produced Cheryl Jensen's evidence that Ann said appellant was cleaning his guns when he threatened to kill her.

2. Defense Evidence

(a) Linda Rushing, a "close friend" of appellant's who had lived on Fortuna Drive since 1997, did not believe Deardorff could see the Fortuna house from his driveway.

(b) Nancy O'Neil, an acquaintance of Ann's, thought she saw Ann alone inside a car at a local intersection on April 25, 1991. Further questioning showed that O'Neil was only "80 percent sure" she saw Ann that day, she was not sure of the date, and she was not sure Ann was driving her minivan.

(c) In 1991, there were surveillance cameras in the pre-boarding areas of Terminal One of LAX. The records from those cameras were generally kept only for six months unless they were requested by law enforcement.

(d) In late March or early April 1991, Ann came into a travel agency and asked an employee named Robin Dorr for a list of every city to which British

Airways flew, in connection with a contest that airline was running.

(e) Joann told Detective Fynan, one of the missing persons detectives, that Ann once said to her, "[M]aybe the family would be better off without me, I'll just go away." Then, Joann told Fynan she did not think Ann was serious when she said that.

(f) Katelin, the Raczs' younger daughter, was the chief defense witness. She testified that appellant sometimes got scratches from gardening and the family had a cat when Ann disappeared. She did not recall who was at the Fortuna house when she arrived there after the Brownies troop outing on April 22. She told the cold case detectives in 2006, and testified before the grand jury, that neither of her parents was home at that time, but at the trial, she thought she might have heard that fact from someone else. She also told the grand jury that after she got home, appellant returned "approximately an hour later" with cold food from McDonald's, but she was not sure of that fact at the trial.

Katelin further testified that she quit her job so she could attend appellant's trial, came to court with appellant almost every day, and was being reimbursed by him for her loss of income. She was "very close" [sic] with him, had spoken many times with his lawyers, and had never spoken with the prosecutors. Between the time of the grand jury proceedings and the trial, one of appellant's lawyers showed her all the letters Ann wrote to Bob. Reading the letters was

a "significant trauma" for her. She thought it was possible that appellant killed Ann, but believed there were other possibilities. Appellant usually told her that Ann "went on a trip," but after 1994 or 1995, she would hear him in another room, angrily saying, "That bitch left me." She had not confronted him about what happened to Ann because it "wouldn't solve anything."

3. Prosecution Rebuttal Testimony

When the homicide detectives interviewed Nancy O'Neil in 1991, O'Neil said she saw Ann and the children inside a vehicle that was not Ann's usual vehicle, and she was not certain of the date.

Detective Comstock, one of the cold case detectives, testified that Katelin told her in June 2006 that appellant once told Katelin he gave Ann $10,000 before Ann went away. Katelin also said she stopped asking appellant about Ann because the subject made appellant angry and because it made Katelin sad to think appellant might have killed Ann.

DISCUSSION

1. Sufficiency of the Evidence

Appellant contends that there was no substantial evidence that (a) he was the perpetrator of Ann's murder, or (b) the murder was committed with premeditation and deliberation.

Utilizing the appropriate standard of review (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), we find substantial evidence to support appellant's conviction.

A. Identity

Appellant concedes that someone murdered Ann, but contends the evidence did not prove he was that person. He stresses what was missing, such as a body, a crime scene, an instrument of death, and forensics evidence tying him to the crime.

In both *People v. Ruiz* (1988) 44 Cal.3d 589, 611, and *People v. Scott* (1959) 176 Cal.App.2d 458, 465 (*Scott*), the courts found sufficient evidence to justify affirming murder convictions, after the defendants' wives abruptly and inexplicably disappeared. *Scott* is particularly apposite here as, like the murder victim in *Scott,* Ann's habits and personality showed that she would not have disappeared voluntarily, she did not contact the people she could be expected to contact if she were traveling, and she left behind items she needed. Also, like the defendant in *Scott,* appellant had a motive and he fabricated explanations for his wife's disappearance.

The evidence about Ann's character and habits showed that she was a reliable person who made plans, told people her plans, and did what she planned. She told Joann and Glenn that after the visit to the Fortuna house they would return to the condo and she would make pizza. The materials for

the pizza were waiting on the kitchen counter at the condo. When Joann announced at the Fortuna house that she was hungry, Ann told Joann she would go to McDonald's. As Ann drove off, she told her neighbor Deardorff that "she had to go because she had to get the kids something to eat." Ann intended to go to McDonald's, return to the Fortuna house, and take the children back to the condo. She did not intend to take a trip.

Ann had many plans for the following days, such as to pick up the children after school every day, visit her mother, have lunch with Cheryl Jensen, attend another counseling session with Pastor Thorp, and meet Bob at Disneyland in June. It was totally out of character for her to suddenly ignore all of her plans, have contact over the next few days only with appellant, suddenly take a trip, and cease all contact forever with everybody she loved. Moreover, it particularly made no sense that she would contact only appellant, whom she feared, and whom she was divorcing.

Also, Ann carefully tried to smooth the children's transition to the divorce, by having their favorite toys moved to the condo, buying entertainment equipment for them, reassuring them of her love, and asking their teachers to let her know if the children's behavior changed. Given the attention and sensitivity that she paid to the children's feelings, it was odd that she would suddenly abandon them on April 22.

The evidence further showed that Ann always told people about her travel plans, took her curling iron and makeup kit with her, and stayed in touch with her loved ones while she was away. It was totally contrary to her habits to suddenly take a trip and not remain in contact with anyone. And if her motive was greed and a carefree life, as appellant suggested, she would not have left money behind at the condo and in her bank accounts, and she would not have accepted $25,000 from appellant when she was entitled to $250,000 in community property.

Appellant had multiple motives for killing Ann, including (a) revenge, because she left him; (b) jealousy, because she was having an affair with Bob; and (c) avarice, because he would have to split the community property with her and pay her support. His extremely negative comments about her after she disappeared showed that he was deeply angry with her for leaving him and for having sex with someone else. The avarice motive must have been particularly strong for him, given the importance he placed on money. His story about Ann's suddenly accepting $25,000 cash from him and leaving her minivan at the Flyaway was never very believable, and he was inconsistent about many details. However, as Ann liked to travel, it took the passage of time to prove she was not in fact traveling.

The jury could reasonably find that appellant manufactured evidence to support his story that Ann was traveling, such as by leaving Ann's minivan at the Flyaway with the purported note from Ann, and

calling the Fortuna house from LAX. He apparently forgot that he left the car at the Flyaway on April 25 and not on April 26.

Some of the evidence was particularly incriminatory, including that two neighbors saw appellant follow Ann just before she disappeared; he was gone for two and a half hours, but the McDonald's restaurant was five minutes away; he had scratches on his hand and face or throat; the possessions of Glenn and Joann that were inside Ann's minivan when she disappeared on April 22 were inside the Fortuna house on April 23; appellant had an unbelievable explanation for Ann's disappearance, and he was unable to keep the facts of his story straight. Also, appellant was much larger than Ann and he was trained in administering choke holds, so he could render her unconscious or kill her without leaving blood. He knew she was coming to the Fortuna house on April 22, and he had an opportunity to kill her when she drove off alone to McDonald's.

In addition to all the other evidence, the People established that a person of Ann's character and habits would not have suddenly disappeared on her own. As in *Scott, supra,* 176 Cal.App.2d at page 489, "the facts found and the reasonable inferences from them proved the nonexistence of any reasonable hypothesis of innocence." A reasonable trier of fact could have found beyond a reasonable doubt that appellant followed Ann and killed her because she was leaving him, was having an affair with someone else, would be taking half the community property,

and would need to be supported financially. (*Jackson v. Virginia* (1979) 443 U.S. 307, 313-319; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) We therefore find that appellant's conviction is supported by substantial evidence.

B. Premeditation and Deliberation

"Generally, there are three categories of evidence sufficient to sustain a premeditated and deliberate murder: evidence of planning, motive, and method. [Citations.] When evidence of all three categories is not present, '[reviewing courts have required] either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing.' [Citation.] But these categories of evidence, borrowed from *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 'are descriptive, not normative.' [Citation.] They are simply an 'aid [for] reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.' [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1224-1225.)

There was very strong evidence of motive here, including, as previously indicated, revenge, jealousy, and avarice.

There also was very strong evidence of premeditation and deliberation, based on these facts:

After Ann moved to the condo on Thursday, April 18, appellant did not know where she lived and she refused to meet with him alone. He learned at the counseling sessions on April 20 and 21 that she was adamant about divorcing him and would be coming to the Fortuna house on April 22 with money for the tile workers. She thought he would be at work on April 22, but he did not work that day. She stayed inside the minivan while they spoke at the Fortuna house on April 22. He asked her to return to the house with the children, which increased the chance he might be alone with her, after the children went into the house. He got the opportunity he had been waiting for when Joann said she was hungry and Ann drove off, alone, to buy food for the children. He followed her and did not wave at his neighbor as he usually did.

Ann told her friends at the women's circle meeting on April 16 that appellant threatened to kill her and would sit in a dark room and say he was "planning . . . the perfect crime." After the meeting, Ann told Christina Bibel that appellant told her he "would kill [her] and they would never find the body."

From the combination of all the facts, the jury could reasonably find beyond a reasonable doubt that appellant followed Ann in order to kill her, grabbed her after she brought the french fries, killed her, and hid her body so it would never be found, just as he had planned to do.

We therefore conclude that there was sufficient evidence to support the finding of premeditation and deliberation.

2. Precharging Delay

Ann disappeared on April 22, 1991. The murder indictment was filed on October 19, 2006. Appellant maintains that the 15 1/2-year delay violated his state and federal constitutional rights to due process of law.

A. The Record

On January 2, 2007, appellant filed a motion to dismiss the indictment based on prejudicial precharging delay. He argued that no new information was obtained after 1991. He also maintained that the delay violated due process, as the defense lost vital information and the witnesses who testified before the grand jury in 2006 had to rely on the detectives' reports of witness interviews in 1991.

The People's opposition to the motion countered that appellant had not shown actual prejudice and had not alleged that the preindictment delay resulted from an attempt by the People to gain a tactical advantage.

When the motion was heard on January 17, 2007, appellant called Joann to the witness stand. She testified that she had forgotten most of what happened at the Fortuna house on April 22, 1991. She

recalled that Ann said, when she picked up the children after school, that they would go to the Fortuna house for 20 minutes to half an hour and then return to the condo where they lived. Ann drove them to the Fortuna house, stayed inside her car while she spoke with appellant in the garage, and asked the children to go inside and wait. Joann thought her parents talked in the garage for about 20 minutes. After Ann left, Joann waited inside the house and then in the side yard outside. She did not recall that appellant mentioned he was leaving the house. She "felt that [appellant] was gone from the house [for] a period of time." Appellant came to the side yard and showed her a bag of food. She looked into the bag, saw that the food was cold, and went inside the house. She did not recall going out to dinner that night. She did not recall talking on the telephone that night, but if she was upset about something at that time, she would probably call her girlfriends. She did not recall what she told the detectives in 1991, but looking at the detectives' reports might refresh her memory.

After hearing Joann's testimony and arguments from counsel, the trial court made the following ruling:

> "Looking at the points and authorities filed by counsel, they listed a number of issues, one was loss of memory by the witnesses, which was shown at this hearing. There was no evidence presented in the points and authorities by counsel nor presented here that memories could not be

> refreshed by other evidence such as statements to the police, et cetera. [¶] Defense alleged that defense evidence has been lost. There is no indication what has been lost with the exception that there is a [Tip's] restaurant that no longer exists. [¶] Defendant stated he would not [be able to utilize] a *Pitchess* motion but there is no showing that that could be helpful by the defendant. [¶] There is no showing that there was a plausible factual scenario showing officer fabrication, et cetera, as is required. [¶] Defense stated that employment records from Tip's were destroyed. That is speculation that they cannot be found, or employees' memories have faded. [¶] And finally defense stated that defendant's memory has faded. There is no declaration as such. [¶] Basically there is an insufficient showing of any prejudice whatsoever and the motion to dismiss for due process grounds is denied."

On April 17, 2007, appellant filed a second motion to dismiss for precharging delay. He maintained that further investigation proved that, through the passage of time, he lost witnesses who saw Ann after April 22, 1991. We will describe those witnesses, *post*. The trial court denied the second motion to dismiss on the ground there still was insufficient evidence of prejudice.

B. The Applicable Law

"[D]elay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay. [Citations.] A claim based upon the federal Constitution also requires a showing that the delay was undertaken to gain a tactical advantage over the defendant." (*People v. Catlin* (2001) 26 Cal.4th 81, 107, 109 (*Catlin*); see also 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 282, p. 432.)

The exact standard for due process violations under the United States Constitution "is not entirely settled. It is clear, however, that the law under the California Constitution is at least as favorable for defendant in this regard as the law under the United States Constitution." (*People v. Nelson* (2008) 43 Cal.4th 1242, 1251 (*Nelson*).) "[U]nder California law, negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process." (*Id.* at p. 1255.)

No matter the length of the delay, prejudice must be established and is not presumed. (*Nelson*, *supra*, 43 Cal.4th at p. 1250.) Prejudice "'may be shown by

loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay.'" (*Catlin, supra,* 26 Cal.4th at p. 107.) The need to balance prejudice against justification arises only if the defendant establishes actual prejudice. If the defendant was not prejudiced by the delay, the reviewing court need not determine whether the delay was justified. (*Scherling v. Superior Court* (1978) 22 Cal.3d 493, 506 (*Scherling*).)

If the delay was caused by further investigation, the justification for the delay is strong. (*Nelson, supra,* 43 Cal.4th at p. 1256.) "'Prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.'" (*Ibid.*, quoting *People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 914-915.)

Whether a defendant has met the initial burden of showing prejudice is a question of fact that is reviewed on appeal under the substantial evidence standard. (*People v. Dunn-Gonzalez, supra,* 47 Cal.App.4th at p. 912, citing *People v. Mitchell* (1972) 8 Cal.3d 164, 167.)

C. Analysis

Despite an exhaustive investigation, the sheriff's department never found witnesses who saw how Ann died or who supported appellant's claims that he met with her on April 23 and 24 and received a telephone call from her on April 26. According to appellant, the

homicide detectives' reports in 1991 show witnesses who stated at that time that they saw Ann after April 22, and those witnesses were no longer available or no longer recalled those observations during the defense investigation in 2007. The problem with that argument is that the exhibits in the second motion to dismiss do not support those claims.

One purportedly lost witness was Darin McDonald, a neighbor of Ann's at the condo at the time she disappeared. The applicable exhibit was a page from the homicide detectives' report. It stated that when McDonald was shown a photo of Ann on May 22, 1991, he said he saw her with two young children on (1) the day she moved in, (2) the following Saturday, and (3) between 4:30 and 5:00 p.m. on both Monday, April 22, 1991, and Tuesday, April 23, 1991. According to a declaration in 2007 from the defense investigator, when the investigator showed McDonald what he said in 1991, McDonald did not recall either "giving the statement" or "being interviewed."

The trial court could reasonably conclude that McDonald must have been wrong in 1991 about when he saw Ann and the children at the condo, as the children were never with Ann after April 22, 1991, and they were at the Fortuna house on April 22, 1991, at the time McDonald said he saw them with Ann at the condo.

Another purported witness was Armando Pulido, who worked at the Carl's Jr. restaurant in 1991. Pulido could no longer be located in 2007, but he told

the homicide detectives in 1991 that he saw appellant and Ann together at that restaurant on May 14, 1991. The trial court could reasonably find that Pulido was wrong about that date, as appellant claimed he did not see Ann after April 24, 1991, and no one else saw Ann after April 22, 1991.

Appellant also claimed that two employees from the Tip's restaurant said in 1991 that they saw Ann after April 22. However, the attached excerpts from the detectives' reports showed that one of those employees, Evangeline Soronio, did not recognize photos of appellant or Ann, and the other, Teresita Pangan, returned to her home in the Philippines before the detectives could interview her. Thus, contrary to appellant's claim, those two witnesses never said they saw Ann after April 22.

The final witness named in the motion was Robin Dorr, the employee from the travel agency. She was not lost, as she testified at the trial, but in any event, she was not sure when Ann came into the agency to inquire about an airline travel contest.

Appellant also argues that there was no difference between the evidence that was available in 1991 and in 2007. The record is to the contrary, as the Raczs children were not consistent about how long appellant was away from the Fortuna house on April 22, 1991, and Kristin Best's information about the two and a half-hour time period was not known to the investigators until Kristin came forward in 2006.

Also, as the trial court found, to the extent the Raczs children did not recall what happened on April 22, 1991, when they testified at the trial in 2007, they could refresh their recollection with the reports and/or transcripts of their previous statements.

We therefore find that there was substantial evidence to support the trial court's finding that appellant was not prejudiced by the preindictment delay. That conclusion means we need not decide whether the precharging delay was justified. (*Scherling, supra,* 22 Cal.3d at pp. 506-507.) We further observe, however, that the delay resulted from a lack of definitive proof of appellant's guilt, rather than an effort by the People to gain a tactical advantage. It was possible that Ann was taking a trip, as appellant maintained for years, or that she had another boyfriend that no one knew about, or that something entirely different happened to her. The evidence of appellant's guilt became stronger over time, after Ann failed to return, and after Kristin came forward with her new evidence in 2006. Also, in addition to Kristin's information about Joann's telephone calls, the cold case investigators learned further information that strengthened the People's case, such as Peter Danna's observation that appellant had a scratch that appeared to have been made by a fingernail, and Cheryl Jensen's evidence that Ann told her appellant had his guns out when he threatened to kill her.

"[W]here, as here, there is neither prejudice to the defendant nor a deliberate delay by the prosecution in order to hamper the defense we conclude that

the defendant has not been deprived of due process." (*Scherling, supra,* 22 Cal.3d at p. 507.) Therefore, there was no error in the denial of appellant's motions to dismiss the prosecution due to preindictment delay.

3. *The Evidence of Ann's Fear and Appellant's Threats*

Appellant contends that the trial court committed prejudicial error and violated the confrontation clause when it ruled, prior to the trial, that the People could present Ann's statements that she feared appellant and he had threatened to kill her.

The trial court admitted Ann's statements for the limited purpose of her state of mind, under the hearsay exception of Evidence Code section 1250 (section 1250), after finding that appellant's claims that Ann voluntarily met alone with him at restaurants on April 23 and 24 created a factual dispute about whether Ann acted in conformity with her fear. The trial court also found that the statements were admissible as nonhearsay evidence of Ann's state of mind, to show that the crime occurred. It then found that the confrontation clause, as interpreted in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), did not apply to the statements. In ruling on *Crawford,* the trial court first found that "the evidence does not appear to be testimonial from the proffer." It then found that, under the then-existing case of *People v. Giles* (2007) 40 Cal.4th 833 (*Giles I*), certiorari

granted *sub nom. Giles v. California* (2008) 552 U.S. 1136, appellant was barred from raising a confrontation clause claim, due to the doctrine of forfeiture by wrongdoing. At the conclusion of the trial, it gave an instruction that evidence that was admitted for a limited purpose was only to be used for that limited purpose.

A. The State-of-mind Hearsay Exception

The abuse of discretion standard of review applies to a trial court's determinations of relevance, the state-of-mind exception to the hearsay rule, and the lack of undue prejudice. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113 (*Guerra*).)

Section 1250 permits the use of hearsay evidence that shows a declarant's state of mind if that state of mind "is itself an issue in the action" or is "offered to prove or explain acts or conduct of the declarant."

"A prerequisite to this exception is that the victim's mental state or conduct be placed in issue." (*Guerra, supra,* 37 Cal.4th at p. 1114.)

"A murder victim's fear of the alleged killer may be in issue . . . when, according to the defendant, the victim has behaved in a manner inconsistent with that fear." (*People v. Hernandez* (2003) 30 Cal.4th 835, 872, citation omitted.)

Numerous cases have applied that principle.

For example, in *People v. Lew* (1968) 68 Cal.2d 774, 778-780, the decedent's fear of the defendant was relevant to disprove the defendant's claim that the decedent was sitting on his lap and examining his gun when it accidentally discharged.

In *People v. Griffin* (2004) 33 Cal.4th 536, 578 (*Griffin*), the 12-year-old victim told a classmate at school that she intended to confront the defendant, her stepfather, if he continued to fondle her. She was killed later that day. Her statement to the classmate was admissible under section 1250 to prove that she confronted the victim in accordance with her statement of intent.

In *Guerra, supra,* 37 Cal.4th at page 1114, the murder victim's statement that she feared the defendant was found to be "clearly probative of her lack of consent to sexual intercourse in the attempted rape."

Another such case, *People v. Crew* (2003) 31 Cal.4th 822 (*Crew*), is factually similar to the present one. The defendant was convicted of murdering his wife Nancy after they left together for a trip across the country. Nancy's body was never found. The defense theory was that Nancy was a troubled person who disappeared of her own accord. Prior to leaving on the trip, Nancy told a friend, "If you don't hear from me in two weeks, send the police." (*Id.* at p. 840.) *Crew* held that Nancy's statement was properly admitted "as evidence that Nancy did not disappear

on her own," and "to explain her conduct concerning going with [the] defendant." (*Ibid.*)

In contrast, in *People v. Jablonski* (2006) 37 Cal.4th 774, 820 (*Jablonski*), and *People v. Noguera* (1992) 4 Cal.4th 599, 622, the victims' statements that they feared the defendants were irrelevant, apparently because there was no issue about what the victims did, as the defendants entered the victims' homes and killed them.

Appellant contends that, as in *Jablonski,* Ann's state of mind was not in dispute, because he never displayed violent conduct toward her. The cases contain no such requirement. He also argues that Ann's behavior did not show that she feared him. We disagree, as totally apart from her statements regarding her fear, Ann did not park at the condo and stayed inside the minivan when she was at the Fortuna house.

Based on *Crew, supra,* 31 Cal.4th 822, and related cases, we conclude that the trial court did not abuse its discretion when it admitted Ann's statements under section 1250 for the limited purpose of Ann's state of mind, because appellant claimed in his multiple statements that Ann voluntarily met with him at restaurants, and that purported conduct by Ann was inconsistent with the fear she expressed in her statements.

We further find that the evidence was admissible for a nonhearsay purpose, as circumstantial evidence of Ann's state of mind, to show that she would not

willingly have met with appellant at the restaurants. (*People v. Green* (1980) 27 Cal.3d 1, 23, disapproved on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 239 & *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3; *People v. Ortiz* (1995) 38 Cal.App.4th 377, 391.)

B. The Confrontation Clause

The trial court first found that Ann's statements were not testimonial, and then found there was no *Crawford* problem based on the interpretation of the forfeiture by wrongdoing doctrine in *Giles I*, *supra*, 40 Cal.4th 833. Subsequent to appellant's trial, the United States Supreme Court reversed *Giles I* in *Giles v. California* (2008) 554 U.S. ___ [128 S.Ct. 2678] (*Giles II*). As we explained in *People v. Banos* (2009) 178 Cal.App.4th 483, 485 (*Banos*), *Giles II* "concluded that the forfeiture by wrongdoing exception applies only upon a showing that the defendant killed the witness *for the purpose of* making him or her unavailable as a witness at trial."

Under *Giles II*, the doctrine of forfeiture by wrongdoing cannot apply here, as there was no evidence that Ann was killed to make her an unavailable witness. Even so, we find that Ann's statements to her friends and relatives are not subject to the confrontation clause because the statements were not testimonial.

Under *Crawford, supra,* 541 U.S. at pages 53-54, the confrontation clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."

Crawford did not define the term "testimonial," but it explained that "testimony" typically is "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" (*Crawford, supra,* 541 U.S. at p. 51.) Also, "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." (*Ibid.*) Examples of "testimonial" statements included "'*ex parte* in-court testimony or its functional equivalent,'" "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,'" "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,'" and "[s]tatements taken by police officers in the course of interrogations." (*Id.* at pp. 51-52.)

Crawford did not need to define the term "testimonial" because "some statements qualify under any definition," "'[s]tatements taken by police officers in the course of interrogations'" fall into that category, and the statement in *Crawford* was taken while police officers were interrogating the defendant's wife

about what she saw when her husband stabbed the victim. (*Crawford, supra,* 541 U.S. at pp. 52-53.)

Post-*Crawford* cases have struggled with "a myriad of hearsay statements made in various circumstances by persons unavailable for trial." (*People v. Cage* (2007) 40 Cal.4th 965, 979 (*Cage*).)

Davis v. Washington (2006) 547 U.S. 813, 821-822 (*Davis*) clarified that a statement must be "testimonial" to fall within the meaning of the confrontation clause. "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." (*Id.* at p. 821; see also *Crawford, supra,* 541 U.S at p. 51; *Cage, supra,* 40 Cal.4th at p. 981.) *Davis* held: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id.* at p. 822, fn. omitted.) Based on that test, *Davis* decided that the victim's statements to a 911 operator were not testimonial, and a domestic battery victim's written statements in an affidavit given to a police officer were testimonial.

Appellant contends that Ann's statements to her friends and relatives qualify as testimonial. Most post-*Crawford* cases have not involved statements to friends or relatives.[9] There are, however, a few cases that discuss that issue.

Davis, supra, 547 U.S. at page 825, observed, "Where our cases did dispense with [the requirements of unavailability and cross-examination,] the statements at issue were clearly nontestimonial. See, e.g., *Bourjaily v. United States*, 483 U.S. 171, 181-184 (1987) (statements made unwittingly to a Government informant); *Dutton v. Evans*, 400 U.S. 74, 87-89 (1970) (plurality opinion) (statements from one prisoner to another)."

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[9] In *Giles II, supra*, 554 U.S. __ [128 S.Ct. 2678], the statements were testimonial, as they were made by the murder victim to a police officer, three weeks before the murder, while the officer was questioning the victim about an assault the defendant had perpetrated on the victim.

In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527], certificates that showed the results of forensic laboratory analysis were held to be testimonial.

In *Cage, supra*, 40 Cal.4th 965, the victim's statements to a sheriff's deputy in a hospital emergency room and at the sheriff's station were testimonial, but the victim's statements to the physician who treated him were not.

In *Banos, supra*, 178 Cal.App.4th 483, statements the victim made during an emergency 911 call and to a police officer who responded to that call were not testimonial, but statements the victim made to police officers while no emergency was in progress were testimonial.

In *Griffin, supra,* 33 Cal.4th at page 579, footnote 19, the court noted, without further discussion, that the murder victim's statement to her school classmate was "not 'testimonial hearsay' within the meaning of *Crawford.*"

In *People v. Cervantes* (2004) 118 Cal.App.4th 162, Division Three of this district held that the defendant's confession to his neighbor was not testimonial under *Crawford,* because it did not involve the types of situations that *Crawford* named as testimonial, and there were no "'"circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial". . . .'" (*Cervantes, supra,* at p. 173, quoting *Crawford, supra,* 541 U.S. at p. 52.)

In a factually similar out-of-state case cited by respondent, *State v. Parks* (La.Ct.App. 2008) 2 So.3d 470, 478-479, the murder victim called her niece, earlier on the night she was murdered, and said the defendant threatened her. *Parks* found that the victim's statement to the niece was not testimonial, as it "[did] not come within the purview of any of the classes of testimonial statements mentioned in *Crawford,*" "[t]he victim was speaking to a friend, and not the police," and "the victim had no expectation that her statement would be of later use to help establish that defendant committed a crime, as she spoke informally and without coercion." (*Id.* at pp. 478-480.)

We also find pertinent the discussion in *Cage, supra,* 40 Cal.4th 965, of statements that the victim

made to an emergency room physician who asked, "What happened?" *Cage* held that that the victim's statements were not testimonial because the physician asked the question to deal with a contemporaneous medical emergency rather than to obtain proof of a past criminal act or the identity of the perpetrator for possible use in court. (*Id.* at p. 970.) Also, the statements were not made during a law enforcement interview, and they "lacked those attributes of testimony by a witness that are the concern of the confrontation clause." (*Id.* at p. 971.)

Here, Ann made her statements to friends and relatives, and not to law enforcement officers. The statements did not fall within any of the categories of testimonial evidence named in *Crawford*, and they were not made under "'circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (*Crawford, supra*, 541 U.S. at p. 52.) The statements "lacked those attributes of testimony by a witness that are the concern of the confrontation clause." (*Cage, supra*, 40 Cal.4th at p. 971.) We therefore conclude that Ann's statements to her friends and relatives were not testimonial, which means the confrontation clause did not apply to the statements.

C. Lack of Prejudice

Moreover, assuming any error in the rulings about Ann's statements, it is not reasonably probable that the error caused prejudice, whether we apply the

standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, or of *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).

Aside from Ann's statements, there was abundant evidence that she feared appellant after she moved out of the Fortuna house. That evidence included (a) Ann parked down the street at a shopping center, instead of at the condo complex, (b) she did not leave the minivan while she was at the Fortuna house, and (c) the brake light of the minivan was on constantly while Ann spoke with appellant, before she drove off to get food at McDonald's.

There also was overwhelming evidence of appellant's guilt. As previously discussed, he had multiple motives for killing Ann, he followed her on the night she disappeared, he returned after a long unexplained delay with cold french fries for the children and fresh scratches on his person, he made numerous conflicting statements about her disappearance, he impeded the investigation, and he concocted evidence. Therefore, although there was no error in the admission of Ann's statements, there was no prejudice, under any standard.

4. Ann's Love Letters to Bob

Appellant also contends that the trial court committed prejudicial error under Evidence Code section 356 (section 356), and violated his Fourteenth Amendment rights to due process and to present a complete defense, by allowing portions of Ann's love

letters to Bob, but refusing to admit into evidence all 109 of the letters. We quoted Ann's final letter in our summary of the facts. We quote below the remaining portions of the letters that the trial court permitted into evidence.[10]

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[10] March 14, 1990: "Somehow I can't get excited about this trip. Luckily, I don't have too much planning to do except make up the children's schedule at home so [appellant] or the neighbors will know what they need to do and for me to pack."

May 11, 1990: "In a few days I should be receiving my Hawaiian wedding ring. When I put that ring on, it will not be or signify a wedding band to me. Nor will I think of it as being a gift from [appellant], even though I charged it to our account. It's just a ring, even though I'll wear it on my left ring finger. In fact, because it will say sweetheart in Hawaiian, and the word is spelled K-U-U-I-P-U, I will think about you every time I feel it or glance at it. I visualize both of us being together and happy in the future which I strongly believe and affirm that fact often so it will be that way in reality."

August 15, 1990: "Now I know I have to speak to [appellant] and tell him of my feeling and my intention to separate from him."

August 24, 1990: "I have a goal in mind which I'm striving for, to not . . . live with John, [and to] have complete or partial custody. I'm willing to share, but he's not at this point. And most importantly, to be with you."

October 15, 1990: "I have to do some financial digging to know where and how much money we have and some other community property information just so I don't enter into a situation and get ripped off. I'm hanging in there, but hating it. I really want out. However, I don't want to do anything too hastily and regret it later. Not the part about leaving John, but settlement and custody, et cetera."

November 26, 1990: "Another thing you said without hesitation is that if we needed more space, and I'm sure we

(Continued on following page)

At several points in the trial, appellant attempted to introduce all 109 of the letters, for the issue of Ann's state of mind. The prosecutors argued that the only relevant portions were those that showed Ann's future intent, such as her desire to divorce appellant and spend the rest of her life with Bob, to contradict appellant's claim that Ann abandoned Bob and the children to take a trip. The prosecutors stressed that portions of the letters were "very sexually explicit," and those portions had to be excluded, to avoid giving the jurors a negative emotional response to Ann that would interfere with deliberations. After reading all 109 letters, the trial court ruled that it would only allow the portions of the letters that were not cumulative and that were relevant to show Ann's future intent, her actions in accordance with that intent, and the likelihood that she would not have behaved contrary to that intent. The defense later sought reconsideration of that ruling, arguing that all 109 of the letters were needed to impeach the witnesses who testified that the children were Ann's entire life. The trial court stuck

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would have enough money then, you would get a bigger house to accommodate us. My heart melted with joy to hear you say that. Makes the reality of being together so possible. I don't know that the package would include all my kids all at once, because I'm sure John would fight for at least one, maybe two. But like you, I may be a part-time parent, which would be fine with me, because some is better than none."

December 19, 1990: "You haven't met Glenn and Joann yet, but they will become part of our lives sometimes too, as well as Katelin."

by its ruling, on the ground the probative value of the excluded love letters was outweighed by the risk of prejudice and confusion.

We find no abuse of discretion or violation of appellant's constitutional rights in the trial court's carefully crafted ruling about Ann's letters.

Section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

People v. Farley (2009) 46 Cal.4th 1053, 1102-1104 (*Farley*), which was decided after the filing of appellant's opening brief, rejected a similar argument. The defendant there became obsessed with a coworker named Black, harassed her, lost his job, returned to his former place of employment, and shot Black and other employees who were present. The trial court admitted some of the letters the defendant wrote to Black and excluded others. *Farley* found no abuse of discretion under section 356, because the excluded letters were not necessary for the jury's understanding of the letters that were admitted, and because without the excluded letters, there already was sufficient evidence of the defendant's state of mind. (*Farley, supra,* at p. 1103.) The same is true here, as the portions of Ann's letters that were admitted were

clear without the excluded portions, and there was sufficient other evidence of Ann's state of mind, particularly since Bob testified at the trial regarding his relationship with Ann.

Farley further observed, "Although defendant makes no persuasive argument supporting his contention that the exclusion of the letters constitutes a violation of his right to present a defense, we observe that, in light of the extensive evidence presented relating to defendant's state of mind, exclusion of the proffered letters also was harmless beyond a reasonable doubt. (See *Chapman*[, *supra,*] 386 U.S. [at p.] 24.)" (*Farley, supra,* 46 Cal.4th at p. 1104.) Similarly here, appellant has not made a "persuasive argument" about a violation of his right to present a defense, but assuming any federal constitutional error regarding the love letters, the error was harmless beyond a reasonable doubt, because the jury heard ample evidence regarding Ann's state of mind, and the evidence of appellant's guilt was overwhelming. (*Chapman, supra,* at p. 24.)

DISPOSITION

The judgment is affirmed.

FLIER, J.

We concur:

BIGELOW, P. J.

GRIMES, J.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOHN RACZ, Defendant and Appellant.	B203267 (Los Angeles County Super. Ct. No. BA320288) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING NO CHANGE IN JUDGMENT (Filed Sep. 29, 2010)

THE COURT:*

GOOD CAUSE appearing therefor, the opinion filed on August 30, 2010, in the above-entitled matter is hereby modified as follows:

1. On page 7, second paragraph, fourth line, change "her" to "his," so that it reads: " . . . appellant broke his hand. . . ."

2. On page 35, on line 1, delete the quotation mark before the word "very" and insert it before the

word "close," so that it reads: "She was very 'close' with him. . . ."

There is no change in the judgment.

Appellant's petition for rehearing is denied.

BIGELOW, P. J. FLIER, J. GRIMES, J.

Court of Appeal, Second Appellate District,
Division Eight – No. B203267

S187260

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JOHN RACZ, Defendant and Appellant.

(Filed Dec. 15, 2010)

The petition for review is denied.

/s/ **GEORGE**
Chief Justice